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No. 88-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

NATIONAL GYPSUM COMPANY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Dissatisfied with the failure of the United States Environmental Protection Agency ("EPA") to provide any scientific standards to determine whether asbestos in school buildings was hazardous, Congress passed the Asbestos Hazard Emergency Response Act of 1986 ("AHERA") and directed the agency to promulgate objective criteria for assessing the extent of any asbestos hazard, to identify appropriate "response actions," and to select response actions using "the least burdensome methods." The EPA's response was to reprint its earlier "guidance," embellished by a paraphrase of certain portions of AHERA. Nevertheless, the lower court blessed the EPA's performance, even though the agency failed to do what was required, reasoning that the EPA had demonstrated "good faith" in taking a first step toward the objective identified by Congress.

The question presented for review is whether, in an area of far-reaching public importance requiring the expenditure of vast amounts of resources, this Court should intervene to correct a lower court decision which fails to hold the agency to well-established administrative law precedents of this Court and which, in approving a "good faith" but inadequate effort to comply with the congressional mandate, countenances agency failure to comply with the clear congressional direction to develop a scientific approach to the problems of asbestos in school buildings.

PARTIES TO THE PROCEEDING

The proceeding below was a consolidated action. The respective parties, intervenors, and docket numbers in the court below are as follows:

1. Safe Buildings Alliance, petitioner in No. 87-1669.

2. National Gypsum Company, petitioner in No. 87-1670.

3. United States Gypsum Company, petitioner in No. 87-1676.

4. John F. Welch, individually and as parent and next friend of John F. Welch, Jr. and Daniel J. Welch, petitioner in No. 88-1016.

5. United States Environmental Protection Agency, respondent in all of the above-described cases.

6. Intervenors include:

(a) The Attorneys General of the various states and the Corporation Counsel of the District of Columbia;

(b) The GAF Corporation;

(c) The American Federation of State, County, and Municipal Employees; the American Federation of Teachers; the Laborers International Union of North America and the Laborers AGC Education and Training Fund; the National Education Association; the National Parent Teacher Association; the Service Employees International Union; and the Sheet Metal Workers International Association;

(d) The American Association of School Administrators; and

(e) The National School Boards Association and Barnwell School District No. 45 of South Carolina.

RULE 28.1 LISTING

Pursuant to Rule 28.1 of the Rules of the Supreme Court, the petitioner hereby makes the following statement disclosing parents, non-wholly-owned subsidiaries and affiliates:

Aancor Holdings, Inc.
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Major, *The United States Environmental Protection Agency's Asbestos Algorithm Exposed*, 3 J. Occup. Health & Safety - Aust. & N.Z. 215 (1985)..... 24, 26

Pinchin, *Asbestos in Buildings*, Royal Commission on Asbestos Studies Series, No. 8 (1982)..... 13, 26

Report of the Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario (1984)..... 12

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IN THE

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October Term, 1988

NATIONAL GYPSUM COMPANY,

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v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner National Gypsum Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled proceeding on May 10, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit appears at pages A-1 to A-13 of the appendix (hereinafter referenced as "A-___"). It is reported as *Safe Buildings Alliance v. United States Environmental Protection Agency* at 846 F.2d 79.

STATEMENT OF JURISDICTION

The District of Columbia Circuit filed its opinion, and the judgment included therein, on May 10, 1988. This petition is filed within ninety days of that date. Jurisdiction in this Court is based on 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

This petition involves the regulations concerning Asbestos-Containing Materials in Schools, 52 Fed. Reg. 41846 (Oct. 30, 1987) (to be codified at 40 C.F.R. Part 763, Subpart E, Sections 763.80-99 and Appendices A, B, and D), set forth at pages A-52 to A-103 of the appendix, which were issued pursuant to the Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, 100 Stat. 2970 (Oct. 22, 1986) (adding Title II, Sections 201-214, to the Toxic Substances Control Act and codified at 15 U.S.C. §§ 2641-54 (Supp. IV 1986)), set forth at pages A-14 to A-51 of the appendix.

STATEMENT OF THE CASE

Clearly concerned that the presence of asbestos-containing materials[1] in school buildings might pose an unreasonable health hazard, and yet persuaded that the Environmental Protection Agency ("EPA") had not provided adequate guidance with which to address this question, Congress passed the Asbestos Hazard Emergency Response Act of 1986 ("AHERA").[2] AHERA

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1. Asbestos is a naturally occurring fibrous mineral with properties that historically made it valuable for a wide variety of uses in construction materials. Surfacing materials are asbestos products sprayed or troweled onto ceilings, walls, or structural steel, generally for acoustical and fire-retardant purposes. Thermal system insulation materials are primarily pipe and boiler wrap. Other uses, known as miscellaneous asbestos-containing material, include ceiling and floor tiles.

2. Pub. L. No. 99-519, 100 Stat. 2970 (Oct. 22, 1986) (adding Title II, §§ 201-214, to the Toxic Substances Control Act and codified at 15 U.S.C. §§ 2641-54 (Supp. IV 1986)) ("AHERA") (A-14 to A-51), as amended by Pub. L. No. 100-368, 102 Stat. 829 (July 18, 1988).

directed the agency to issue regulations within 360 days describing so-called "response actions" that would "protect human health and the environment" in "the least burdensome" manner. 15 U.S.C. § 2643(d)(1) (A-20).

The EPA failed in its mission. Rather than doing what Congress had commanded, it simply repeated the vague generalities which had been the substance of its previous "guidance" and left it to local school authorities, in tandem with self-interested asbestos abatement consultants, to select a response action which would presumably protect human health and the environment — precisely the status quo ante which Congress found deficient and which prompted AHERA in the first instance.

Nonetheless, the Court of Appeals for the District of Columbia Circuit denied petitions for review.[3] As a result, the asbestos-in-schools controversy — which touches millions of school officials, parents, and children and has already taxed the resources of innumerable communities throughout the nation — is, from a regulatory perspective, no closer to a resolution following AHERA than it was before the enactment of that law. Moreover, the confusion and uncertainty which surround the issue of asbestos-containing construction products are not confined to schools alone but include approximately three-quarters of a million public and commercial buildings as well. Thus, as more fully explained below, the default of the EPA, the unwillingness of the lower court to correct the situation, and the great importance of the issue as a matter of public policy require the intervention of this Court.

* * *

This dispute has its origins in the late 1970's when, following some initial reluctance, the EPA agreed to consider the issuance of regulations addressing asbestos in schools.[4] Almost three years later, the EPA issued such a rule, but one which carefully avoided any specific advice to the schools.

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3. The jurisdiction of the court of appeals was based on 15 U.S.C. § 2618(a)(1)(A) (Supp. IV 1986).

4. Grant of Petition to Initiate Rulemaking Proceeding to Regulate Sprayed Asbestos in Schools, 44 Fed. Reg. 40900 (July 13, 1979).

Instead, it merely directed schools to "identify friable asbestos-containing building materials" and to notify employees and "the school's parent-teacher association of the inspection results."[5]

Ironically, the EPA's preamble conceded that "[m]any of the friable asbestos-containing materials in schools do not require abatement or removal." 47 Fed. Reg. at 23360. However, the rule articulated no standards or criteria against which the propriety of abatement or removal could be measured. Instead, it directed attention to the EPA's separate "guidance document," the so-called "Orange Book,"[6] which was replaced in 1983 by the "Blue Book,"[7] and then in 1985 by the "Purple Book."[8]

The Purple Book is a sophisticated study in ambivalence and equivocation. It points out that the levels of asbestos in buildings are "typically 10,000 to 100,000 times lower than levels in asbestos industry workplaces where asbestos-related diseases have been well documented." *Id.* at 1-1. It notes further that "[t]he presence of asbestos in a building does not mean that the health of building occupants is necessarily endangered." *Id.* at S-1. Finally, it observes that "[i]f asbestos-containing material (ACM) remains . . . in good condition and is unlikely to be disturbed, exposure will be negligible." *Id.* at 1-1.

At the same time, however, the Purple Book predicts that "a small proportion of people exposed to low levels of asbestos will develop asbestos-related diseases" and that "[s]mokers, children and young adults are at somewhat greater risk," *id.* at 1-1 — without in any way quantifying or otherwise specifying,

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5. Friable Asbestos-Containing Materials in Schools: Identification and Notification, 47 Fed. Reg. 23369 (May 27, 1982) (codified at 40 C.F.R. Part 763, Subpart F, §§ 763.100-119 and Appendix A). The rule was limited to "friable" asbestos-containing material, defined as material "which, when dry, may be crumpled, pulverized, or reduced to powder by hand pressure." *Id.* § 763.103(d).

6. EPA, *Asbestos-Containing Materials in School Buildings: A Guidance Document, Parts 1 & 2*, C00090 (March 1979).

7. EPA, *Guidance for Controlling Friable Asbestos-Containing Materials in Buildings*, EPA 560/5-83-002 (March 1983).

8. EPA, *Guidance for Controlling Asbestos-Containing Materials in Buildings*, EPA 560/5-85-024 (June 1985) ("Purple Book").

with any particularity at all, what is meant by "a small proportion," "low levels," or a "somewhat greater risk."

In the face of this equivocation, Chapter 4 of the Purple Book recommends (but does not require) that school officials assess the current condition of asbestos-containing materials (by seeking evidence of deterioration or delamination, physical damage, and water damage), as well as the potential for future disturbance or damage (by observing such factors as proximity to air plenum, degree of activity in the building, and change in building use). *Id.* at 4-3. Again, without any concrete criteria or other specificity, school officials are advised to rate the current condition of asbestos-containing materials as "good," "minor damage or deterioration," or "poor" and the potential for future damage or disturbance as "low" or "high." *Id.* at 4-7, Table 2. Then, they are told to choose, from a smorgasbord of options, some remedy — such as an operations and maintenance program, removal (selective or complete), enclosure, or encapsulation — once more without any even vaguely rigorous system or other yardstick against which to measure such highly subjective terms as "high" and "low," "good" and "poor," etc. *Id.*

The EPA was quite satisfied with the sufficiency of this "guidance." Indeed, it argued to Congress that federal regulations should not supplant the Purple Book and that local officials should be permitted a degree of "flexibility."[9] Congress, however, found that the Purple Book and its predecessors simply did not do the job:

> *First*, the panic surrounding asbestos in buildings has made rational decisions over abatement action impossible in many cases. *Second*, the public is confused over what kind of asbestos applications present real health risks and in what situations asbestos-containing materials are best left undisturbed. *Third*, the current demand for abatement work far exceeds the supply of reliable, trained contractors.

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9. *Hearing before the Subcommittee on Toxic Substances and Environmental Oversight of the Committee on Environment and Public Works*, 99th Cong., 2d Sess. 15 (May 15, 1986) (Testimony of John A. Moore, EPA Assistant Administrator for Pesticides and Toxic Substances).

H.R. Rep. No. 212, 99th Cong., 1st Sess. 26 (1985) (emphasis added). Worse yet, the EPA and other experts had warned that the majority of contractors are "inexperienced and unqualified." As a result:

> Many schools have had the unfortunate experience of spending substantial sums on unnecessary and poor quality removals, only to find asbestos exposures increased and their problems made worse.

Id. at 26.

Senator Stafford of Vermont, who was to become the principal Senate sponsor of AHERA, stated even more bluntly:

> *EPA has issued technical guidance, but no standards for asbestos identification, hazard evaluation, and removal.* As a result, schools have been uncertain about how to proceed. Too often, pressure from parents has forced school officials to remove asbestos that should have been left in place.

132 Cong. Rec. S1476 (daily ed. Feb. 20, 1986) (emphasis added). In the words of Senator Chafee:

> EPA's failure to produce proper standards and regulations to date for asbestos in schools is beyond excuse; the schools have not had the tools they need to address asbestos hazards.

132 Cong. Rec. S15069 (daily ed. Oct. 3, 1986). Indeed, as Senator Stafford concluded:

> Not only has money been spent needlessly, but in some cases, the danger has been increased by disturbing the asbestos. The problem has been exacerbated by untrained and unscrupulous contractors who have preyed on the fears of school occupants and school officials.

132 Cong. Rec. S1476 (daily ed. Feb. 20, 1986).

The result was AHERA. The statute begins with the unequivocal premise that the EPA's guidance includes "neither standards for the proper identification of asbestos-containing material and appropriate response actions . . . nor a requirement

that response actions . . . be carried out in a safe and complete manner once actions are found to be necessary." 15 U.S.C. § 2641(a)(1) (A-14). As a result:

> *[S]ome schools have not undertaken response action while many others have undertaken expensive projects without knowing if their action is necessary, adequate, or safe.* Thus, the danger of exposure to asbestos continues to exist in schools, and some exposure actually may have increased due to lack of Federal standards and improper response action.

Id. § 2641(a)(1) (emphasis added) (A-14). To dispose of any possible lingering doubt, Congress states:

> The guidance provided by the Environmental Protection Agency in its "Guidance for Controlling Asbestos- Containing Material in Buildings" [*i.e.*, Purple Book] is insufficient in detail to ensure adequate responses. Such guidance is intended to be used only until the regulations required by this title become effective.

Id. § 2641(a)(3) (A-14).

To accomplish its purpose, Congress gave the EPA specific instructions for the issuance of regulations which require inspection and implementation of appropriate response actions in the nation's schools in a "safe and complete manner." *Id.* § 2641(b)(1) (A-15). Within 360 days, the EPA was to issue regulations designed to supplant the Purple Book.[10] More specifically, the EPA was explicitly mandated to do the following:

> 1. Promulgate regulations which provide criteria for assessing the extent of the hazard, if any, "at least" in those

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10. AHERA also provided that, following promulgation of the regulations, school officials develop and submit to their Governor management plans for buildings containing asbestos prior to October 12, 1988, 15 U.S.C. § 2645(a)(A33), and begin implementation of those plans by July 9, 1989, 15 U.S.C. § 2643(i)(A-23 to A-27). Congress has recently extended the deadline for submission of the plans to no later than May 9, 1989, although the implementation deadline was not changed. Amendment to the Toxic Substances Control Act, Pub. L. No. 100-368, 102 Stat. 829 (July 18, 1988).

circumstances where there is "damage," "significant damage," "potential damage," or "potential significant damage." *Id.* § 2643(c)(1)(A)-(D) (A-19, A-20).

2. Promulgate regulations identifying, in light of the assessment criteria described above, "*the appropriate* response action" which will "protect human health and the environment." *Id.* § 2643(c)(1), (d)(1) (emphasis added) (A19, A-20).

3. Promulgate regulations identifying a response action which will advance the protection of human health and the environment "using the least burdensome methods." In making this determination, "the Administrator shall take into account local circumstances, including occupancy and use patterns within the school building and short- and long-term costs." *Id.* § 2643(d)(1) (A-20).

At least to this extent, and notwithstanding some internal contradictions in the legislative process that led to AHERA, the EPA's mandate is clear and unequivocal. Nonetheless, the final rules accomplish none of the legislative objectives. *See Asbestos-Containing Materials in Schools*, 52 Fed. Reg. 41846 (October 30, 1987) (to be codified at 40 C.F.R. Part 763, Subpart E, Sections 763.80-99 and Appendices A, B, and D) (A-52 to A-103).

The final rules do little, if anything, more than the Purple Book, and surely they are no more specific than was AHERA itself. Thus, school officials, called "local education agencies" or "LEA's," are required to retain "an accredited inspector" to conduct an inspection and classify asbestos-containing materials in one of seven categories.[11] 40 C.F.R. § 763.85(a)(3) and

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11. The agency has simply taken each of the four circumstances delineated by Congress — damage, significant damage, potential damage, and potentially significant damage — and subdivided by type of friable asbestos-containing material — miscellaneous, surfacing, and thermal system insulation. *See* 40 C.F.R. §§ 763.83 and 763.88. When these definitions are organized according to Congress' categories — damage, significant damage, potential damage, and potentially significant damage — it is clear that the EPA has only repeated the congressional instructions.

§ 763.88(b)(1)-(7) (A-62, A-68 to A-69). The assessment "may" (but is not required to) include factors such as location, condition (*e.g.*, water or physical damage), accessibility, potential for disturbance, vibration, etc. — essentially the factors laid out in the Purple Book. *Compare* 40 C.F.R. § 763.88(c)(1)-(6) (A-69) *with* Purple Book Ch. 4 (discussed more fully at p. 5, *supra*). Based on the foregoing, the LEA is directed *itself*:

> [To] select . . . the appropriate response actions in this section consistent with the assessment conducted in § 763.88. The response actions selected shall be sufficient to protect human health and the environment.

40 C.F.R. § 763.90(a) (A-70). Furthermore:

> In selecting the response action [in certain circumstances] . . . the *local education agency* [*i.e.*, *not* the EPA] shall determine which of these response actions protects human health and the environment.

40 C.F.R. § 763.90(c)(2) (emphasis added) (A-71). Finally:

> The *local education agency* may then select, from the response actions which protect human health and the environment, that action which is the least burdensome method.

40 C.F.R. § 763.90(a) (emphasis added) (A-70).

Notwithstanding the unmistakable legislative intent, the Agency's failure is as clear as its mandate:

> 1. The final rules do nothing whatsoever to establish standards or criteria for assessing the hazard to human health, if any, other than to repeat AHERA's own general description of such categories as "damage" or "potential damage," albeit in slightly different words, and to parrot the same collection of considerations which are set forth in the Purple Book and have been rejected by Congress as patently inadequate.
>
> 2. The final rules do nothing to identify "the appropriate response action" which will "protect human health and

the environment" for any of these circumstances, leaving the task (and the confusion and anxiety that go along with it) to the local school agencies — precisely the evil which AHERA was designed to avoid. *See* 40 C.F.R. § 763.90(b)-(g) (A-70 to A-72). Nor has the EPA made any attempt to determine or explain whether any response action will do anything to protect human health and the environment, and if so, when, how, and in what circumstances. Instead, all that EPA has done is to regurgitate, for each potential circumstance identified by Congress in the statute, all the response actions which the statute directed EPA to consider.[12]

3. The final rules do not identify the response action which will protect human health and the environment "in the least burdensome manner," again leaving the task, and the anguish, to local school officials, exactly the result which the legislation was meant to obviate. *See* 40 C.F.R. § 763.90(a).

In failing to address these issues, the EPA ignored its own administrative record which is replete with data suggesting answers to the underlying threshold questions. Ironically, these

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12. For example, for damaged friable surfacing or miscellaneous material, a local educational agency may repair, encapsulate, enclose, or remove. 40 C.F.R. § 763.90(c)(2) (A-71). These response actions, however, are identical to the methods contained in chapters 3 and 5 of the Purple Book, which Congress specified as potential response actions for damaged material. *Compare* 15 U.S.C. § 2643(d)(2) (A-20 and A-21) *with* 40 C.F.R. § 763.90(c)(2) (A-71) *and* Purple Book §§ 3.3, 4.2, ch. 5. Similarly, for significantly damaged friable surfacing or miscellaneous material, a local authority may encapsulate, enclose, or remove. 40 C.F.R. § 763.90(d) (A-71). These, too, are identical to the methods contained in chapter 5 of the Purple Book, which Congress specified as potential response actions for significantly damaged material. *Compare* 15 U.S.C. § 2643(d)(3) (A-21) *with* 40 C.F.R. § 763.90(d) (A-71) *and* Purple Book § 4.2 and ch. 5. Thus, the EPA's description of response actions adds nothing to Congress' instructions, contained in 15 U.S.C. § 2643(d) (A-20 to A-21), concerning response actions for circumstances identified by Congress. *Compare generally* 40 C.F.R. § 763.90(b)-(f) (A-70 to A-72) *with* 15 U.S.C. §2643(d)(2)-(5) (A-20 and A-21) *and* Purple Book, chapters 3 and 5.

data generate substantial doubt not only whether the rules will accomplish anything, but whether in fact they will only make matters worse.

As the EPA itself has acknowledged, levels of airborne asbestos in buildings are typically 10,000 to 100,000 times lower than the levels at which asbestos-related diseases have been documented, *see supra* at p. 4, an observation with substantial support in every study, without exception, which has ever been conducted.[13] For example, EPA's own study, pursuant to Section 213 of AHERA, 15 U.S.C. §2653(3) (A-50), concludes preliminarily that there is "no difference between levels found in buildings with [asbestos-containing material] and outdoor ambient levels".[14] Similarly, a study by scientists in Great Britain concluded that airborne fiber levels in buildings seldom

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13. In the preamble to the AHERA rules, EPA relies on a 1983 study of airborne levels in Houston schools for potential exposures to students. 52 Fed. Reg. at 41844, *citing* EPA, *Airborne Asbestos Levels in Schools*, EPA 560/5-83-003 (1983) ("*Constant Study*"). However, only six months later, in its report to Congress on asbestos in public and commercial buildings, EPA finally acknowledged that the Constant results were inaccurately high; EPA relied instead on a reanalysis of the Constant data showing air levels consistent with those described above. EPA, *Study of Asbestos-Containing Materials in Public Buildings: A Report to Congress* 11, 8-1 (Feb. 1988), citing Lee, *The Constant Study Revisited* (1987). That reanalysis was submitted to the agency by petitioner as part of the AHERA rulemaking proceeding but was inexplicably disregarded by the agency when it issued the AHERA rules. The agency's sudden change of heart is particularly noteworthy because it has had in its files, since 1985, a report which reaches the conclusion that the *Constant Study* had overstated airborne asbestos fiber levels by one to two thousand times, a report which it withheld from the public until March 1988. *See* Burdett, *Interlaboratory Comparison of the U.S. Environmental Protection Agency School Samples by the U.K. Health and Safety Executive* 15 (Nov. 1985).

14. EPA, *Study of Asbestos-Containing Materials in Public Buildings: A Report to Congress* 12 (1988). The report proceeds to confess, in so many words, that the EPA is reluctant to apply its AHERA rules to public and commercial buildings, other than schools, of course, absent the acquisition of data which suggests, for example, that there is any difference in risk between indoor exposure and outdoor ambient exposure. *Id.* at 22. Although couched in predictably bureaucratic language, this admission is astonishing.

exceed .0005 fibers per cubic centimeter ("f/cc");[15] by contrast, the most recent Occupational Safety and Health Administration ("OSHA") standard for permissible exposure in the workplace is hundreds of times higher at .2 f/cc.[16]

However, the data go further. While exposure to asbestos has been shown to cause illness under some circumstances, the causal connection has been established through epidemiological studies of people exposed, usually for a working lifetime, to concentrations of asbestos orders of magnitude greater than those generally encountered in buildings.[17] By contrast, there is no reliable scientific or medical evidence of disease from the ultra-low exposures uniformly measured in buildings.[18] While there remains some theoretical risk of illness resulting from exposure even to these minuscule levels, such risk is trivial when compared to other risks which we endure in our daily

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15. Doll & Peto, Health and Safety Commission (U.K.), *Asbestos: Effects on Health of Exposure to Asbestos* 47-48 (1985); *see also* Crump & Farrar, *Statistical Analysis of Airborne Asbestos Fiber Data Collected from Schools and Analyzed by Transmission Electron Microscope* 8 (1987) (average airborne asbestos concentrations in schools of .0002 f/cc); *Report of the Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario* 577 (1984) (average exposure less than .001 f/cc).

16. OSHA, Occupational Exposure to Asbestos, 29 C.F.R. § 1910.1001 (1987). This standard itself represents a dramatic reduction over the exposures that have resulted in the asbestos-related disease that is the subject of asbestos personal injury litigation. *See* note 17, *infra*.

17. *See, e.g.*, EPA, *Airborne Asbestos Health Assessment Update*, EPA 600/8-84-003F at 73 (June 1986) (occupational exposures among asbestos insulation workers estimated to average 15 f/cc); EPA, *Support Document for Final Rule on Friable Asbestos-Containing Materials in School Buildings: Health Effects and Magnitude of Exposure* 91 (Jan. 1982) (9 f/cc).

18. *E.g.*, U.S. Surgeon General, *The Health Consequences of Smoking: Cancer and Chronic Lung Disease in the Workplace* 199 (1985) ("it is generally accepted that [exposures to asbestos near ambient levels] do not substantially alter the occurrence of lung cancer or chronic lung disease in the general population"); EPA, *Airborne Asbestos Health Assessment Update*, *supra* note 17, at 162 ("the limited data that indicate the validity of [the linear exposure response] relationship [for asbestos-related disease] are for exposures two or three orders of magnitude higher than those of concern for environmental exposures").

lives.[19]

Finally, as EPA's own data reveal, even properly conducted removal projects have resulted in elevated airborne fiber levels within buildings after they have been cleared for reoccupancy.[20] Nevertheless, the final rules provide that school officials may choose to remove asbestos despite the absence of any regulatory indication that removal is required or even advised. 40 C.F.R. § 763.90(a) (A-70).[21]

As the lower court correctly points out, Congress provided the agency with a very considerable degree of latitude. Senator Stafford invoked what he viewed as "prevailing scientific opinion, . . . that there is no known safe level of asbestos exposure and that efforts should be made to avoid even low level exposure"; he emphasized that AHERA requires the EPA only to identify response actions that are sufficient to protect human

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19. Weill & Hughes, *Asbestos as a Public Health Risk: Disease and Policy*, 7 Ann. Rev. Public Health 171, 181 (1986) (risk of eating four tablespoons of peanut butter per day is twenty-one to four hundred times greater than risk of attending school constructed with asbestos-containing building products).

20. Tuckfield, *et al.*, *Evaluation of Asbestos Abatement Techniques, Phase 3: Removal* Tables 7-1 and 7-2 (Sept. 1986) (EPA Contract No. 68-02-4243) (showing elevated levels 3, 6, and 9 mos. after clearance); *see also* Burdett, *et al.*, *Airborne Asbestos Fibre Levels in Buildings: A Summary of U.K. Measurements*, Symposium on Mineral Fibres in the Non-Occupational Environment, International Agency for Research on Cancer (Sept. 1987); Pinchin, *Asbestos in Buildings*, Royal Commission on Asbestos Studies Series, No. 8 at 7.12, 7.19 (1982).

21. In the lower court's opinion, the petitioners are admonished to direct their dissatisfaction "not at the clause permitting removals in circumstances where school officials consider removals prudent," but rather "at those provisions that were designed to preclude unsafe and incomplete removals." 846 F.2d at 84 (A-11). The irony of the opinion is that the latter "provisions" simply do not exist. The clearance level set forth in the AHERA regulations, 40 C.F.R. § 763.90(i) (A-72 to A-76), does not address the fact that the studies cited in note 20, *supra*, show that upon reoccupancy of the building, following clearance, asbestos exposures have fluctuated above the clearance level standards. Moreover, while there are regulations intended to protect removal workers and building occupants *during* asbestos abatement, there are simply no regulations, other than the clearance standard, that set forth response action procedures to protect building occupants after reoccupancy.

health, rather than to prove that a particular response action is absolutely necessary to protect human health; and he noted that the EPA need not establish a quantitative measure of safety as a predicate to certain response actions. 132 Cong. Rec. S15064-66 (daily ed. Oct. 3, 1986).

In light of the uncontradicted data set forth in the immediately preceding paragraphs of this petition, the bases for Senator Stafford's assertion that there is "no safe level of exposure" are not very clear. Perhaps Senator Stafford intended only to say that there is no level of exposure at which the risk of illness is absolutely zero. However, as this Court observed in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 642 (1980), " 'safe' is not the equivalent of 'risk-free.'" The presence of some risk does not mean that the exposure is not "safe"; life is fraught with risk; and thus, "safe" is simply a degree of risk which we find tolerable as a matter of policy.

If, by endorsing the view that there is "no safe level of asbestos exposure," Senator Stafford meant to say that there is no level of exposure at which, as a matter of public policy, the risk of injury is acceptable, one would have expected Congress to direct the EPA forthwith to issue regulations aimed at eliminating asbestos exposure in its entirety. Congress did not choose that route. Instead, recognizing the risks to abatement workers and the potential hazards associated with asbestos disposal,[22] it directed the EPA to require a program of maintenance practices and to identify when additional response actions should be taken to "protect human health and the environment."

In discharging this function, the EPA was blessed with a wide degree of latitude and discretion, and it was not directed to act with quantitative precision. Nonetheless, it was commanded to do something, certainly more than it had done in the Purple Book. The "something" was to set forth with some specificity the criteria for distinguishing when various response actions are appropriate for the various circumstances that might be found in

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22. *See* H.R. Rep. No. 763, 99th Cong., 2d Sess. 22 (1986).

school buildings and then for each of those circumstances, and at a minimum for the four circumstances identified by Congress, to select response actions which in some way are shown to have a rational connection to the legislative objective of protecting human health and the environment. What the EPA was not permitted to do was to avoid these tasks in their entirety, *i.e.*, do nothing, least of all delegate these vital determinations to local school officials.

Notwithstanding the unmistakable reason for AHERA and the clear congressional directive to the EPA to remedy its earlier deficiencies, the lower court read the statute "as the framework for an evolving administrative response" to the presence of asbestos in schools and anticipated "that EPA would refine its initial regulatory approaches over time," as more information about asbestos became available. 846 F.2d at 82 (A-6 and A-7). In other words, the lower court concluded that, even if the regulations did not meet the clear expectations of AHERA, it was sufficient that they took the first step forward in that ultimate direction.

Thus, the lower court reasoned that the final rules were a "reasonable, faithful interpretation of AHERA's somewhat contradictory commands." 846 F.2d at 82 (A-8). The court's view was based on a perception that the EPA had reasonably decided that "some compromises were necessary." *Id.* (A-8). The court reasoned it was not unreasonable for the agency to conclude that it might do something less than what Congress directed it to do. That is, despite the clear legislative mandate to the contrary, the Court accepted the EPA's view that:

> [A] rigid response action decision structure is not appropriate for this rule, primarily because many asbestos hazard situations are too circumstantial and appropriate response actions are too "hazard specific" to fit neatly into a discrete set of prescriptive categories.

846 F.2d at 82, *quoting* 52 Fed. Reg. at 41838. Disregarding the fact that the Agency had not correlated the conditions in buildings — *i.e.*, whether a hazard was present or potentially present — with the action appropriate to protect human health,

the lower court was willing to accept what EPA purported to offer in the regulations:

> [A] list of specific responses that [EPA] adjudged sufficient to protect human health, along with a *method* by which school officials should be able to determine the least burdensome response in the buildings they supervise.

Id. at 82 (emphasis original) (A-8).

This, however, does not satisfy the congressional mandate. Even assuming *arguendo* that EPA could have complied with the statutory mandate by providing a method to determine what response action was least burdensome, rather than identifying that response itself, more fundamentally it was required itself to determine the response action or actions which protect human health and the environment in certain identified circumstances and to provide the method (*i.e.*, objective criteria) for identifying those circumstances. The final rules simply do not accomplish these tasks, and yet the lower court refused to order the EPA to do otherwise.

As a result, the panic, the confusion, the excess demand for reliable contractors, the needless expenditure of money, and the exacerbation rather than elimination of whatever danger may exist will continue. This is a problem which has risen to a level of very considerable national importance and ultimately embraces the issue not just of asbestos in schools, but the larger question of asbestos in all public and commercial buildings; and, for the reasons explained more fully below, this petition for a writ of certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD CORRECT THE DECISION OF THE LOWER COURT BECAUSE IT FAILED TO DIRECT EPA TO OBEY THE CLEAR AND UNAMBIGUOUS MANDATE OF CONGRESS AND PERMITTED THE AGENCY INSTEAD MERELY TO DEMONSTRATE THAT IT HAD MADE A GOOD FAITH EFFORT TO COMPLY, A RULING WHICH IS CONTRARY TO WELL-ESTABLISHED PRECEDENTS OF THIS COURT.

As the preceding Statement of the Case shows, the mandate of AHERA is clear and unmistakable. It was passed against a background of vagueness, lack of specificity, and unbridled discretion in the hands of local school officials ill-equipped to deal with complex scientific data and political pressures. Accordingly, it directed the EPA to do precisely what it had previously failed to do, *i.e.*, fill in the blanks in three areas — assessment criteria, response actions for protecting human health and the environment, and the least burdensome methods to achieve that important goal.

Yet even a casual reading of the regulations shows that the EPA did no more than reprint the instructions set forth in AHERA. They contain no assessment criteria at all and merely repeat the four circumstances which Congress had already identified, *e.g.*, "damaged," "significantly damaged," etc.; they do nothing to select "the appropriate response action" which will protect human health and the environment; and they simply default on the obligation to select "the least burdensome methods."

However, the court of appeals denied petitions for review and simply countenanced the agency's failure. In so doing, it refused to direct the agency to comply with a statutory mandate which is, in pertinent part, clear and unambiguous. Instead, it chose to bless the EPA's "good faith" effort to take a step forward, rather than actually reaching the goal identified by Congress, and it declined to judge the agency's performance according to standards previously set by this Court. If left

uncorrected, the opinion of the lower court not only has major implications for environmental policy, and more particularly the important public question of asbestos in buildings, but, in addition, represents a very troubling departure from basic principles which guide the entire field of administrative law.

On one level, it was thought to be well-established that if the legislative intent of the statute is clear, the courts will command the agency to act accordingly. For example, this Court has articulated the principle as follows:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (footnote omitted); *accord, Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 107 S. Ct. 1855, 1860 (1987) (if statutory language clearly expresses intent of Congress, "judicial inquiry is complete").

Neither AHERA itself nor the legislative history is barren of ambiguity or self-contradiction. Nonetheless, it is beyond dispute that Congress found the Purple Book inadequate because of its lack of specificity and mandated the EPA to plug the holes with specific assessment criteria and response actions which protect human health and the environment in the least burdensome manner. It is further beyond dispute that the EPA has fallen far short of that target.

Nevertheless, the lower court rationalized the EPA's failure by suggesting that AHERA was "plainly intended" as a structure for an "evolving administrative response" to the presence of asbestos in schools. 846 F.2d at 82 (A-6 and A7). Under this rationale, the court understood Congress to contemplate that the EPA would "refine its initial regulatory approaches over time" as more information and scientific data became available. *Id.* (A-7).

The court's rationale cannot withstand scrutiny. As set forth above, AHERA was "plainly intended," not as a structure for an "evolving administrative response," but as a command to set assessment criteria, select the appropriate response actions, and identify the least burdensome methods. The goal is thus clear. Nevertheless, the lower court's opinion would lead one to believe that the EPA could satisfy its mandate by making some incremental progress toward the goal, rather than actually achieving it. A fair reading of the statute does not permit this conclusion. *See, e.g., Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 746 (1973) (courts "are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute").

Second, the lower court's rationale, and especially its cavalier reference to "an evolving administrative response," create a dangerous precedent which has no basis in earlier authority, *viz.*, the notion that although the agency may not have satisfied the requirements of the legislative mandate, it suffices for the agency to have demonstrated "good faith" by taking at least the first step in that direction. This proposition is utterly without precedential support. To be sure, the courts have occasionally excused an agency's failure to meet a statutory deadline or other time requirement, so long as the agency has acted in "good faith."[23] However, petitioner knows of no case which supports the proposition that an agency's good faith effort will excuse a clear failure to satisfy its substantive mandate. Indeed, such a proposition would drop the standard of performance to which agencies have traditionally been held to a level never before endorsed by this Court or any other tribunal, with the exception of the court of appeals in this case. This has never been the law; it should not be the law; and this Court should grant the writ and reaffirm this basic proposition.

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23. *See, e.g., Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1975) (official in question had "in good faith employed the utmost diligence in discharging his statutory responsibilities").

Finally, the lower court's opinion fails to require adherence by the agency to the standard of performance set out in this Court's opinion in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980). In the last analysis, the EPA has committed the very evil here which was condemned in that case: it has promulgated regulations which might reduce exposure and thus might protect human health, without any showing that they are in fact sufficient to protect the American public from the injuries which AHERA intended to prevent. As in *Industrial Union Department*, "the record lack[s] substantial evidence of any discernible benefits." 448 U.S. at 614. Nevertheless, the lower court declined to hold the agency to this clearly articulated standard, thus creating a situation which this Court should grant the writ to correct.

This Court's decision in *Industrial Union Department* suggests an additional, even more troubling problem with the EPA's final AHERA rules. Under section 763.80(a) (A-53), "[l]ocal education agencies may contractually delegate their duties" under the regulations to private contractors, while retaining ultimate responsibility for the proper discharge of those duties. The unavoidable implication of this delegation provision is that AHERA may be read in such a fashion that it requires *neither* the EPA *nor* the LEA's to make classification decisions and select the appropriate and least burdensome response actions, but instead permits those duties to be delegated to yet some other party. If AHERA can be read in that manner, however, it must be understood to entail "such a 'sweeping delegation of legislative power' that it might be unconstitutional" under the authority of *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). To quote *Industrial Union Department* once again, "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored." 448 U.S. at 646.

The lower court opinion is thus at best troublesome and at worst dangerous. It fails to direct compliance with an unmistakable legislative mandate; it permits the agency instead to escape its duty by showing that it made a "good faith" effort; it allows

the agency to avoid the requirement that it show, based on evidence in the record, how its regulations achieve the goals set by Congress; and it suggests a view of AHERA which, if accepted, would render the act unconstitutional. Such a result goes far beyond the issue of asbestos in schools and has implications which permeate the entire area of administrative law. For this reason, the Court should grant the writ, reverse the judgment of the lower court, and reaffirm basic principles which were previously thought to be the bedrock of our administrative law system.

II. THIS COURT'S GUIDANCE IS NEEDED IN THIS AREA OF GREAT NATIONAL IMPORTANCE WITH FAR-REACHING FISCAL AND ENVIRONMENTAL CONSEQUENCES WHERE THE LOWER COURT'S DECISION IS AT ODDS WITH THE EXPLICIT MANDATE OF CONGRESS, PRECEDENTS OF THIS COURT, AND SCIENCE.

Apart from the questions of administrative law raised by this petition, the final AHERA rules have ramifications of national dimension for our educational system, the economy, the courts, and the health and safety not only of the current generation of school children, but all occupants of buildings with asbestos-containing products.

In the last ten years, the issue of asbestos in buildings has become a matter of far-reaching public importance. It has generated massive attention from the media, the scientific community, the general public which works and lives in buildings in which asbestos-containing construction products have been installed, and the legal profession. Building owners have filed approximately two hundred law suits, seeking relief in connection with the abatement of asbestos-containing products; the United States District Court for the Eastern District of Pennsylvania has certified a representative action on behalf of a national class of public and private, elementary and secondary schools; and, already saddled with tens of thousands of asbestos

personal injury cases, the resources of the state and federal judicial systems have been taxed to capacity.

The result has been an enormous expenditure of fiscal and other social resources, exacerbated by an underlying confusion and uncertainty which plagues the public debate on the entire question. Much of this turmoil can be traced to the EPA, which has consistently failed to provide balanced and complete technical information indispensable to rational decision-making with respect to asbestos in buildings:

> [T]he asbestos-in-schools program [of the EPA] . . . has not encouraged rational or responsible risk management. Regulations require that parents be notified if "friable" asbestos is found, but EPA technical guidance is lacking on how school officials are to evaluate risks and select appropriate corrective measures. The potential for panic and overreaction is tremendous—leading to wasted resources and possibly higher asbestos exposures if complete removal is undertaken in schools where modest containment measures are appropriate. The committee urges EPA to provide more balanced and complete technical information to encourage more rational and less emotional responses to asbestos in schools.

H.R. Comm. on Appropriations, *Report on Department of Housing and Urban Development-Independent Agencies Appropriation Bill, 1985*, H.R. Rep. No. 98-803, 98th Cong., 2d Sess. 19 (1984).

The deficiencies of the EPA's "guidance" provoked a storm of criticism in the scientific community, the media, the legal profession, the public at large, and, above all, the government. To address these concerns, Congress determined that the EPA should set specific standards for assessing whether the presence of asbestos in schools poses a hazard, identify the appropriate response actions, and specify how to accomplish this task using the least burdensome methods. However, the congressional mandate has not been achieved. Thus, the uncertainty and panic

will continue; expensive, unnecessary, and perhaps counterproductive response actions will ensue; and litigation will inevitably follow.

The fiscal consequences cannot be exaggerated. The EPA has estimated that the AHERA regulations will affect 107,000 school buildings. 52 Fed. Reg. at 41845. The cost of compliance is estimated to be in excess of three billion dollars. *Id.* Thus, the rule will have a substantial impact on the expenditure of limited national resources allocated to the education of our children.

However, the impact of the regulations is not merely financial. To the extent that the regulations perpetuate the EPA's patently inadequate earlier guidance, the concern which prompted AHERA persists: some schools will undertake no response actions at all, while others will indulge in expensive projects without having the vaguest idea whether their actions do anything to promote the protection of human health and the environment. Whatever danger may exist is likely to continue and, indeed, exposures may only increase as a result of insufficient federal standards and improper response actions.

Nor are the consequences limited to schools and students. The EPA estimates that twenty percent of all public and commercial buildings — approximately 733,000 — contain friable asbestos-containing products.[24] The cost of compliance with the AHERA regulations for those buildings has been estimated at fifty-one billion dollars.[25] Thus, while the agency has not recommended any extension of the AHERA regulations to those buildings at this time,[26] the regulations will undoubtedly influence the behavior of building owners, whether regulated or not, who can be expected to look to the EPA for the scientific and objective expertise it was asked explicitly by Congress to provide on this issue.

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24. EPA, *Study of Asbestos-Containing Materials in Public Buildings: A Report to Congress* 8 (Feb. 1988).

25. *Id.* at 35.

26. *Id.* at 36; *see also id.* at 22 (EPA reluctant to extend AHERA regualtions until there is evidence, now lacking, of a greater risk from asbestos exposures indoors than outdoors).

The Court must grant certiorari to assure that the EPA complies with the statutory mandate to promulgate regulations that establish standards for the protection of human health and the environment by the least burdensome means. The EPA should be required to provide expertise to the nation's school officials and by precedent, if not by mandate, to the owners of public and commercial buildings, so that they will undertake rational, rather than emotional, responses to asbestos in their buildings.

III. THE WRIT SHOULD BE GRANTED BECAUSE THE LOWER COURT'S OPINION ALLOWED THE EPA TO DISREGARD CONGRESSIONAL DIRECTIONS TO PROVIDE SCIENTIFIC STANDARDS FOR SCHOOLS TO RESOLVE ASBESTOS-IN-BUILDINGS PROBLEMS.

At bottom, the EPA's blatant failure to do as it was commanded by the legislature, and the lower court's seal of approval, suggest yet a third fundamental reason the writ should be granted: the EPA has not provided a scientific basis for schools to use to determine what should be done with asbestos-containing products found in buildings.

The EPA has rightly been criticized for its failure to set objective standards based on scientific data,[27] and AHERA was passed against a background of clear legislative dissatisfaction with the failure of the EPA to provide scientific methods to determine when an asbestos hazard exists. To correct these deficiencies, Congress directed the EPA to develop objective standards based on available scientific data for assessing health

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27. *See, e.g.*, Major, *The United States Environmental Protection Agency's Asbestos Algorithm Exposed*, 3 J. Occup. Health & Safety - Aust. & N.Z. 215 (1985); Hughes & Weill, *Asbestos Exposure—Quantitative Assessment of Risk*, 133 Am. Rev. Respiratory Diseases 5, 11 (1985); Corn, *Asbestos and Disease: An Industrial Hygienist's Perspective*, 47(9) Am. Ind. Hyg. Assoc. J. 515, 521 (1986).

hazards and selecting appropriate response actions. That Congress expected a scientific approach to hazard assessment and response action selection is illustrated by its direction to the EPA:

> [C]onsider and assess the value of various technologies intended to improve the decisionmaking process regarding response actions and the quality of any work that is deemed necessary, including air monitoring . . . .

15 U.S.C. § 2643(c)(2) (A-20).

Without doubt, Congress did not direct the EPA to use air monitoring standards to accomplish its assigned task, but it did expect a scientific approach to hazard assessment — that is, an approach grounded in scientific methodology, supported by standardized data, and establishing objective criteria for determining when and what response is appropriate for the variety of conditions where asbestos is found in school buildings. Only such an approach would eliminate the subjectivity of the criteria advanced in the Purple Book for which the EPA has been consistently criticized.

The legislative admonition to consider air monitoring is perfectly understandable in light of the EPA's typical use of such data in connection with pollutants other than asbestos. In fact, the EPA "commonly publishes an 'acceptable level' of exposure to a contaminant, requires periodic monitoring, and specifies engineering methods to be applied if those limits are exceeded." Gough, *Uncle Sam Flunks Asbestos Control In Schools*, Issues in Science and Technology 81, 84 (Spring 1988).

The EPA bareiy paid lip service to this legislative admonition:

> EPA continues to discourage the use of air monitoring as the primary technique for assessing asbestos hazards, since that method only measures current conditions and provides no information about potential and future levels of fiber release . . . .
>
> As factors to be used in determining whether response actions are necessary, [air monitoring data] provide a false

> sense of precision regarding the presence and severity of asbestos hazards and the appropriateness of a given response action.

52 Fed. Reg. at 41838.[28]

Having rejected air sampling techniques, however, EPA has devised no scientifically proven method for assessing the perceived dangers of asbestos in buildings — as Congress pointedly commanded it to do — let alone using such methods as a yardstick for selecting appropriate response actions. Instead, it simply reiterated the subjective factors, advocated by its prior guidance, which have no basis in science and are incapable of consistent application and replication.[29] Then, without any further technical or scientific information, the agency delegated its own statutorily mandated obligation to determine appropriate response actions to the local educational agencies and previously criticized "rip and skip" contractors who, in the future, will be "accredited."[30]

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28. The concern that air monitoring measures "current" conditions only and thus may miss higher or "peak" levels at other times is not supported by the available data which in fact show that any such purported peaks do not add significantly to cumulative exposures of building occupants. *See* Crump, *Comments on Issues Related to the Percentage of EPA Criterion Fibers that Are No Longer than 5 Microns and on the Potential Effects Upon Average Fiber Concentrations of High Transient Levels* (1987); *see also* EPA, *Study of Asbestos-Containing Materials in Public Buildings: A Report to Congress* 7-4 (Feb. 1988) ("EPA has no data on the contribution of incident-related releases to overall building fiber levels"). Moreover, the concern with "potential" exposure is hyperbolic; in almost every instance, asbestos-containing construction products were installed in buildings at least fifteen years ago, if not twenty or twenty-five years ago, and inasmuch as material of such age has yet to result in anything other than ultra-low levels of exposure, the alleged threat of unknown but "potential" exposure becomes largely meaningless.

29. Ironically, the EPA's own *Constant Study* (*see* note 13, *supra*) concludes that subjective criteria of the kind contained in the final AHERA rule do nothing whatsoever to measure the concentrations of airborne asbestos fibers. *Constant Study* at 71, Table 22; Pinchin, note 20, *supra*, at 6.8; Major, note 27, *supra*.

30. The mere accreditation of the inspectors will not assure either consistent or scientifically-grounded assessments and, therefore, the requirement of accreditation does not replace regulatory standards for building

Ironically, the EPA has now bared its soul and provided the best evidence of its own failure. The occasion is its belated report pursuant to Section 213 of AHERA, 15 U.S.C. § 2653, which directed the agency to submit the results of a study, on or before October 17, 1987, designed, *inter alia*, to:

> [C]onsider and report on whether public and commercial buildings should be subject to the same inspection and response action requirements that apply to school buildings . . . .

Id. § 2653(3) (A-50).

The report[31] opens with the familiar EPA refrain that there is "[n]o safe threshold . . . for asbestos," *id.* at 5; and then it (a) quickly proceeds to rely on air sampling data as a measure of exposure, *id.* at 10-11, (b) asserts preliminarily that there appears to be "no difference between levels found in buildings with [asbestos-containing materials] and outdoor ambient levels," *id.* at 12, and (c) finally concludes that whether the AHERA regulations should be applied to public and commercial buildings is a decision which must await the assembly of further data addressing, among other things, prevailing levels of exposure in such buildings, whether removal helps or only makes matters worse, and whether the AHERA rules have been shown to have any utility in the schools at all, *id.* at 21-23. Loosely translated, the report contains an uninhibited confession that air monitoring data are indispensable to any rational and systematic assessment of hazard and that, absent such data, the EPA has no idea whether its AHERA regulations do anything to protect human health and the environment, not to mention whether in fact they only make matters worse.

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assessment. Thus, when EPA's own regional asbestos coordinators applied assessment criteria analogous to those in the AHERA rules to estimate what percentage of schools in their regions fitted into each of the AHERA categories, their estimates varied no less than ten-fold. EPA, *Asbestos Hazard Emergency Response Act Economic Impact Analysis* 20, Table 6 (April, 1987).

31. EPA, *Study of Asbestos-Containing Materials in Public Buildings: A Report to Congress* (Feb. 1988).

The issue of air monitoring data is merely illustrative of a more deeply rooted and pervasive problem. Congress did not require the EPA to employ air monitoring, but it did direct the agency to consider it and, in so doing, Congress had the benefit of a history of EPA reliance on scientific data and quantitative methods. The conclusion is thus inescapable that the congressional mandate to set specific standards was a command to do what the agency had traditionally done with respect to pollutants other than asbestos: to establish criteria with a firm basis in available scientific data — either through air monitoring or some other equally systematic and scientifically legitimate methodology.

The EPA did neither. It disregarded both the clear statutory mandate and the irrefutable realities of modern science. Yet the lower court did nothing to correct this deplorable development, save to encourage further such administrative behavior. Thus, the same unguided and ill-disciplined approach to asbestos in buildings may now impact 733,000 buildings, at a public and private expense running easily in the billions. Such a situation cannot be tolerated, and therefore, this Court's intervention is sorely needed.

CONCLUSION

For the foregoing reasons, National Gypsum Company respectfully urges the Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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Dated: August 8, 1988

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINION OF THE UNITED STATES COURT OF APPEALS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1669

SAFE BUILDINGS ALLIANCE, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

NSBA,
BARNWELL SCHOOL DISTRICT NO. 45,
AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS,
GAF CORP.,
ATTORNEY GENERALS OF VARIOUS STATES,
CORPORATION COUNCIL OF D.C.,
AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, et al., INTERVENORS

No. 87-1670

NATIONAL GYPSUM COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

NSBA,
BARNWELL SCHOOL DISTRICT NO. 45,
AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS,
INTERVENORS

No. 87-1676

UNITED STATES GYPSUM COMPANY, PETITIONER

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 88-1015

MIRRER YESHIVA K'TANAH and
BERNARD FRYSHMAN, PHD., PETITIONERS

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 88-1016

JOHN F. WELCH, individually and as parent and
next friend of JOHN W. WELCH, JR. and
DANIEL J. WELCH, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

NSBA,
BARNWELL SCHOOL DISTRICT No. 45,
AMERICAN ASSOC. OF SCHOOL ADMINISTRATORS,
INTERVENORS

PETITIONS FOR REVIEW OF AN ORDER OF
THE ENVIRONMENTAL PROTECTION AGENCY

Argued March 31, 1988

Decided May 10, 1988

Edward W. Warren, with whom *L. Mark Wine*, *Timothy S. Hardy*, *John Gibson Mullan*, *Lawrence T. Hoyle, Sr.*, *William H. Lewis, Jr.* and *Thomas R. Bartman* were on the joint brief, for petitioners. *James W. Moorman* also entered an appearance for petitioner National Gypsum Company. *Robert J. Aamoth* also entered an appearance for petitioner Mirrer Yeshiva K'Tanah and Bernard Fryshman, Ph.D.

Mary Elizabeth Ward, Attorney, Department of Justice, with whom *Roger J. Marzulla*, Acting Assistant Attorney General, and *Alan H. Carpien*, Attorney, Environmental Protection Agency, were on the brief, for respondent.

Daniel Guttman, with whom *Scott H. Strauss* for Citizens Intervenors, *Darci L. Rock* for National School Boards Association, et al., *Donna L. Dagnall*, *Thomas Mark Schmidt* for State Attorneys General and *August W. Steinhilber* for National School Boards Association were on the joint brief, for intervenors Citizen Intervenors, et al. *William A. Anderson* also entered an appearance for intervenors National School Boards Association, et al.

Patrick M. Raher and *David F. Grady* were on the brief for intervenor American Association of School Administrators.

Michael A. Wiegard and *Paul A. Zevnik* were on the brief for intervenor GAF Corporation.

Frederick D. Cooke, Jr. entered an appearance for intervenor Corporation Counsel of D.C., et al.

Before: EDWARDS and WILLIAMS, *Circuit Judges*, and OBERDORFER,* *District Judge*.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: Since 1979, the Environmental Protection Agency ("EPA") has provided technical assistance to elementary and secondary school officials in identifying and controlling asbestos in school buildings. Although EPA required that school buildings be inspected for asbestos-containing material ("ACM") and that the results of those inspections be reported to school officials and parents, it supplied only imprecise, nonbinding advice concerning the repair or removal of ACM. EPA also declined to say what ambient concentrations of asbestos posed a danger to the health of students, teachers, administrators and maintenance workers. As a result, some school officials did nothing, perhaps endangering the health of school building occupants. Others harkened to the self-interested advice of newly created asbestos removal firms and ordered removal of all ACM. Those removals were sometimes unnecessary, at times even detrimental, since slipshod work may increase ambient concentrations of asbestos.

Congress enacted the Asbestos Hazard Emergency Response Act of 1986 ("AHERA"), Pub. L. No. 99-519, 100 Stat. 2970 (codified at 15 U.S.C. §§ 2641-2654 (Supp. IV 1986)), in an attempt to right this highly confused and potentially dangerous state of affairs. Bemoaning "the lack of regulatory guidance" from EPA, 15 U.S.C. § 2641(a)(1), Congress commanded the agency to issue regulations *within 360 days* covering school inspections, the accreditation of inspectors and management planners, and the determination and implementation of appropriate response actions. 15 U.S.C. § 2643(a).

EPA promulgated regulations prior to the statutory deadline.[1] The petitioners in this case, former manufacturers of ACM, contend that these regulations fail in

[1] *See* 52 Fed. Reg. 41,826-98 (1987) (to be codified at 40 C.F.R. §§ 763.80-.99).

several ways to fulfill AHERA's mandate. For reasons stated herein, we deny their petitions for review.

I. Background

AHERA is an admittedly hasty response to a widespread and pressing problem. Given the nature of the assignment, there was no way for EPA to achieve absolute precision in regulations dealing with asbestos hazards. Indeed, the statute does not even appear to contemplate regulatory *precision*. It requires EPA to "promulgate regulations describing a response action in a school building under the authority of a local educational agency, using the least burdensome methods which protect human health and the environment." 15 U.S.C. § 2643 (d) (1). At first blush, this crucial provision appears to demand nothing more than a list of appropriate responses to ACM in various circumstances. Moreover, AHERA contains incorporating references to EPA's existing guidelines, which merely describe different possible responses, *see* 15 U.S.C. § 2643(d) (2)-(5), and only requires that local educational agencies, not EPA itself, develop asbestos management plans for buildings under their control. *See* 15 U.S.C. § 2643(i) (1).

Other aspects of the statute, however, suggest that more specific advice is required. The legislative "findings" in AHERA openly criticize EPA for offering inadequate guidance. *See* 15 U.S.C. § 2641(a). Moreover, AHERA states explicitly that, "[i]n determining the least burdensome methods, the Administrator shall take into account local circumstances, including occupancy and use patterns within the school building and short- and long-term costs." 15 U.S.C. § 2643(d) (1). How EPA is to make such determinations and how specific they are to be, given that AHERA covers over 30,000 schools across the country in divergent circumstances, Congress neglected to say.

Complicating EPA's job further is the uncertainty concerning the dangers of exposure to low levels of asbestos. Senator Stafford, one of AHERA's chief sponsors, noted that "[t]he American Cancer Society, reflecting prevailing scientific opinion, testified that there is no known safe level of asbestos exposure and that efforts should be made to avoid even low-level exposure." 132 CONG. REC. at S15,064 (daily ed. Oct. 3, 1986). He went on to emphasize that AHERA only requires EPA to identify response actions that are *sufficient* to protect human health; it need not prove that a particular response action is absolutely *necessary* to protect human health. *Id.* at S15,066. "Doubt," he said, "should be resolved in favor of affording greater protection." *Id.* Senator Stafford further emphasized that EPA need not establish a quantitative measure of safety before it permitted or required certain response actions. *See id.* at S15,066; Joint Explanatory Statement, *id.* at S15,065.[2]

Given Congress' awareness of the dearth of precise information about the hazards of exposure to asbestos, the tight timetable it imposed on EPA, its requirement that EPA conduct further studies to ascertain "whether there is a need to establish standards for, and regulate asbestos exposure in, public and commercial buildings," 15 U.S.C. § 2653; *see* 15 U.S.C. § 2641(b)(3), and its short-term focus on the sufficiency rather than the necessity of certain response actions to protect human health, AHERA was plainly intended as the framework for an

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[2] Because the final version of AHERA resulted from informal negotiations between the House and Senate sponsors of different versions of the Act, no authoritative committee reports exist explaining AHERA's provisions. A common Statement was agreed upon and read to both the House and Senate in lieu thereof. Senator Stafford further stated, when introducing the bill, that his remarks and those of other Senators who were actively involved in negotiating the final version "will serve as legislative history for purposes of discerning the intent of the authors of the substitute bill." 132 CONG. REC. at S15,065 (daily ed. Oct. 3, 1986).

evolving administrative response to the perils posed by ACM in schools. Congress impelled EPA to act quickly to address existing hazards. In doing so, it accorded EPA considerable leeway in determining adequate methods of dealing with extant problems. Congress expected EPA to improve on the guidelines it had hitherto offered to school officials, but it did not—because it could not—say exactly how fast or how far EPA should go in rendering its counsel more precise. Congress contemplated, however, that EPA would refine its initial regulatory approaches over time, as more information about the dangers of asbestos became available, as the relative merits of different abatement techniques became known, and as the costs of various responses became clearer. *See* Joint Explanatory Statement, 132 CONG. REC. at S15,065. It is against the backcloth of this legislative design that we must assess the petitioners' objections to EPA's attempt to embody AHERA's aims in detailed regulations.

II. ANALYSIS

A. *EPA's Alleged Failure to Define The Least Burdensome Response Action*

The petitioners fault EPA for failing to specify a single least burdensome response action in the various situations described in 15 U.S.C. § 2643(d)(2)-(5). In addition, they contend that EPA abdicated its responsibility by leaving it to school officials to ascertain the least burdensome abatement methods in the unique circumstances of their schools, following their receipt of reports from accredited inspectors and management planners.

We reject these contentions. Indeed, it is highly ironic that industry representatives assail EPA for supplying inadequate guidance to school officials when their counsel have assured us that those officials are now thoroughly satisfied with the regulatory guidance provided by EPA. Confronted by the Sisyphean task of reconciling Congress'

general demand that it describe "a response action . . . using the least burdensome methods which protect human health and the environment," 15 U.S.C. § 2643(d)(1), with Congress' injunction to "take into account local circumstances, including occupancy and use patterns within the school building and short- and long-term costs" in over 30,000 cases, *id.*, EPA reasonably concluded that some compromises were necessary. In the preamble to its final rule, EPA stated that "a rigid response action decision structure is not appropriate for this rule, primarily because many asbestos hazard situations are too circumstantial and appropriate response actions are too 'hazard specific' to fit neatly into a discrete set of prescriptive categories." 52 Fed. Reg. at 41,838 (1987). Instead, EPA offered a list of specific responses that it adjudged sufficient to protect human health, along with a *method* by which school officials should be able to determine the least burdensome response in the buildings they supervise.

We find that EPA's regulations effect a reasonable, faithful interpretation of AHERA's somewhat contradictory commands.[3] As the petitioners concede, "Congress understood that EPA could not visit thousands of schools and write a specific plan for managing [ACM] in each one." Joint Brief for Petitioners at 22. What EPA could—and did—do was require that schools be searched for ACM by inspectors accredited in conformity with EPA regulations; that officials of schools containing ACM obtain a report detailing abatement options and recommendations by a management planner (also ac-

[3] The rigid "time limits set by Congress indicate that a reviewing court should accord the [EPA] 'an extra dollop of deference.'" *Puerto Rico Maritime Shipping Auth. v. Federal Maritime Comm'n*, 678 F.2d 327, 336 (D.C. Cir.) (quoting *Houston Lighting & Power Co. v. United States*, 606 F.2d 1131, 1145 (D.C. Cir. 1978), *cert. denied*, 444 U.S. 1073 (1980)), *cert. denied*, 459 U.S. 906 (1982). We have done so in reviewing this case.

credited in accordance with EPA regulations); that those officials, in formulating a management plan, choose from among the set of response actions found by EPA to be sufficient to protect human health and the enviromnent; and that their plan be approved by the state governor, thereby assuring further oversight. This seems to us a careful, intelligent attempt to meet Congress' confusing demands. In light of the deference due EPA in these circumstances, we cannot but reject the petitoners' objection.

B. *EPA's Failure to Establish Safe Levels of Asbestos Exposure*

The petitioners argue that, even if EPA need only define response actions sufficient to protect human health and the environment in a variety of situations, it cannot do so without first determining what levels of asbestos exposure are safe. Yet, EPA has not pronounced any ambient concentrations safe or unsafe. Hence, they contend, EPA's regulations lack a rational basis, and must be set aside as arbitrary and capricious.

This argument is meritless. Congress explicitly recognized that experts presently disagree over what levels of exposure are safe. *See* 132 CONG. REC. at S15,064-66. Nevertheless, it stated that EPA's existing guidelines should serve as minimum standards in devising appropriate response actions. Congress nowhere said that EPA need rely exclusively or even mainly on air monitoring techniques in selecting response actions, or that it need establish a quantitative measure that it deems safe. Indeed, the legislative history affirmatively suggests an intent not to impose such requirements. *See id.; see also* 132 CONG. REC. at H8823 (daily ed. Oct. 1, 1986) (remarks of Representative Florio). Congress left these matters for EPA to decide, and commissioned further studies of the hazards of asbestos exposure. Congress

envisioned growing precision in EPA's regulations over time, as more information becomes available, but it did not intend that EPA do nothing until scientific experts agreed on a quantitative measure of safety. Indeed, the petitioners' insistence that EPA construct a quantitative model before it do anything else offends common sense as well as congressional intent, for the *potential* hazards posed by presently undamaged ACM obviously could not be quantified or measured by air monitoring techniques. *See* 52 Fed. Reg. at 41,838 (1987) (defending EPA's recommendation of visual inspection as the primary monitoring technique).

It should also be borne in mind that EPA's regulations were framed against the backdrop of past proceedings to establish safe levels of asbestos. *See* 52 Fed. Reg. at 41,844. This is not a case where an agency, confronted by conflicting evidence, merely threw up its hands and declined to act. Rather, EPA conducted hearings in an attempt to determine the dangers associated with different concentrations of asbestos. Because Congress required it to define response actions that are sufficient to protect human health (erring on the side of caution), not to find the absolute minimum responses necessary to accomplish that end, EPA considered it unnecessary to resolve prevailing disagreements among scientific experts. Instead, it selected response actions that Congress and most experts deemed sufficient to protect those who study or work in school buildings. In view of the special deference owed to an agency's expert judgment on matters at the frontiers of science, *see, e.g., Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983); *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1504-05 (D.C. Cir. 1986), we can hardly brand EPA's failure to establish a safe level of exposure or to require the use of air monitoring arbitrary and capricious.

C. *EPA's Decision to Permit Removal of ACM in All Cases*

Section 763.90(a) of EPA's regulations reads in part: "Nothing in this section shall be construed to prohibit removal of [ACM] from a school building at any time, should removal be the preferred response action of the local education agency."

The petitioners advance two objections to this provision. They argue, first, that EPA possesses no evidence showing that the removal of ACM is *ever* beneficial. The available evidence, they say, reveals that even properly conducted removals *raise* asbestos levels, and that EPA should therefore have forbidden removals. Joint Brief for Petitioners at 40-43. Second, they argue that, even if their first point is unsound, EPA should not have permitted removals when current asbestos levels are below the "clearance level" that must be attained whenever an abatement action is performed, *id.* at 43-44, or when they are not the least burdensome method of curing a school's asbestos problem. Brief of Intervenor GAF Corp. at 21 n.15.

EPA considered and reasonably rejected the first of these arguments. *See* 52 Fed. Reg. at 41,844. It noted that studies showing increases in asbestos levels following removal were based on a small sample of cases, in at least some of which abatement actions were *not* done properly. EPA's regulations covering removal were intended to prevent this occurrence in the future. To the extent that the petitioners have a quarrel with EPA's regulations, their dissatisfaction should be directed at those provisions that were designed to preclude unsafe and incomplete removals, not at the clause permitting removals in circumstances where school officials consider removals prudent. The petitioners, however, have not challenged those provisions.

The conclusion that EPA acted properly in not banning removals appears inescapable in light of the fact that

Congress apparently assumed that removal would always be an option. For example, Congress set as a minimum the response actions described in EPA's existing guidelines and those response actions include removal in almost every case. *See* 15 U.S.C. § 2643(d)(2)-(5). Senators Stafford and Moynihan also mentioned removal as an option for local educational agencies. *See* 132 CONG. REC. at S15,066, S15,068. The petitioners' broadside attack on the permissibility of removal, based in part on studies involving removal techniques that are not now authorized and despite contrary indications in the legislative history, is unavailing.

The petitioners' second argument is patently mistaken. It may be the case that in some instances well-performed removal is merely innocuous rather than beneficial. But that fact, although a sound reason for school officials not to waste money on needless removals, is not an adequate reason for EPA to proscribe removals in some or all cases. The legislative history renders it abundantly clear that EPA, as Senator Baucus said, "should not discourage a school from going ahead and eliminating their long-term asbestos problem if school officials should decide that is the best course of action." 132 CONG. REC. at S15,067; *see id.* at S15,066 (remarks of Senator Stafford).[4] Moreover, Congress stated clearly that AHERA does not constrain school officials to use the least burdensome method found by EPA to be sufficient to protect human health and the environment. EPA's regulation

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[4] In response to the argument that EPA's regulations might be read as biased in favor of removal as an appropriate response, Government counsel assured this court in oral argument that the regulations were intended to be—as on their face they are—neutral with respect to the advisability of removing ACM in some or all situations. It is on the understanding that the regulations are neutral on this point that we uphold them.

permitting removal in all cases is thus fully in accord with congressional intent.[6]

III. Conclusion

EPA's regulations defining least burdensome response actions, establishing a method by which management plans are to be formulated and implemented, and permitting removal of ACM if school officials so desire represent a reasonable interpretation of AHERA's less than pellucid demands. Accordingly, we deny the petitions for review.

So ordered.

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[6] The petitioners raise two minor objections to EPA's regulations, both of which we reject.

First, intervenor GAF Corporation contends that EPA has illicitly expanded AHERA's definition of "school building" by adding to it "[a]ny portico or covered exterior hallway or walkway" and "[a]ny exterior portion of a mechanical system used to condition interior space." *Compare* 15 U.S.C. § 2642(13) *with* 40 C.F.R. § 763.83. We find sufficient EPA's explanation that "these exterior areas, by virtue of the accessibility of the ACM found there, warrant inclusion under the rule." 52 Fed. Reg. at 41,829. EPA's additions only make explicit what is implicit in AHERA's definition of "school building" and help to effectuate Congress' aims.

Second, the American Association of School Administrators ("AASA") argues that EPA, in following AHERA's own timetable, set unreasonably short deadlines for the submission of management plans, that it could have and should have extended those deadlines, and that its failure to do so constitutes arbitrary and capricious agency action. This argument is baseless. Not only does AHERA impose mandatory deadlines, which EPA accurately transcribed in its regulations, but AASA never adduced anything approaching persuasive evidence that schools could not comply with those deadlines. *See* Comments of AASA (Aug. 25, 1987), *reprinted in* J.A. 974. Hence, we see no reason to overturn EPA's decision not to amend its regulations.

TEXT OF ASBESTOS HAZARD EMERGENCY RESPONSE ACT, 15 U.S.C. § 2641, *et seq.*

§2641. Congressional findings and declaration of purpose

(a) Findings

The Congress finds the following:

(1) The Environmental Protection Agency's rule on local educational agency inspection for, and notification of, the presence of friable asbestos-containing material in school buildings includes neither standards for the proper identification of asbestos-containing material and appropriate response actions with respect to friable asbestos-containing material, nor a requirement that response actions with respect to friable asbestos-containing material be carried out in a safe and complete manner once actions are found to be necessary. As a result of the lack of regulatory guidance from the Environmental Protection Agency, some schools have not undertaken response action while many others have undertaken expensive projects without knowing if their action is necessary, adequate, or safe. Thus, the danger of exposure to asbestos continues to exist in schools, and some exposure actually may have increased due to the lack of Federal standards and improper response action.

(2) There is no uniform program for accrediting persons involved in asbestos identification and abatement, nor are local educational agencies required to use accredited contractors for asbestos work.

(3) The guidance provided by the Environmental Protection Agency in its "Guidance for Controlling Asbestos-Containing Material in Buildings" is insufficient in detail to ensure adequate responses. Such guidance is intended to be used only until the regulations required by this title become effective.

(4) Because there are no Federal standards whatsoever regulating daily exposure to asbestos in other public and commercial buildings, persons in addition to those

comprising the Nation's school population may be exposed daily to asbestos.

(b) Purpose

The purpose of this subchapter is —

(1) to provide for the establishment of Federal regulations which require inspection for asbestos-containing material and implementation of appropriate response actions with respect to asbestos-containing material in the Nation's schools in a safe and complete manner;

(2) to mandate safe and complete periodic reinspection of school buildings following response actions, where appropriate; and

(3) to require the Administrator to conduct a study to find out the extent of the danger to human health posed by asbestos in public and commercial buildings and the means to respond to any such danger.

(Pub.L. 94-469, Title II, § 201, as added Pub.L. 99-519, § 2, Oct. 22, 1986, 100 Stat. 2970.)

§ 2642. Definitions

For purposes of this subchapter —

(1) Accredited asbestos contractor

The term "accredited asbestos contractor" means a person accredited pursuant to the provisions of section 2646 of this title.

(2) Administrator

The term "Administrator" means the Administrator of the Environmental Protection Agency.

(3) Asbestos

The term "asbestos" means asbestiform varieties of

(A) chrysotile (serpentine),
(B) crocidolite (riebeckite),
(C) amosite (cummingtonite-grunerite),
(D) anthophyllite,

(E) tremolite, or
(F) actinolite.

(4) Asbestos-containing material

The term "asbestos-containing material" means any material which contains more than 1 percent asbestos by weight.

(5) EPA guidance document

The term "Guidance for Controlling Asbestos-Containing Material in Buildings" means the Environmental Protection Agency document with such title as in effect on March 31, 1986.

(6) Friable asbestos-containing material

The term "friable asbestos-containing material" means any asbestos-containing material applied on ceilings, walls, structural members, piping, duct work, or any other part of a building which when dry may be crumbled, pulverized, or reduced to powder by hand pressure. The term includes non-friable asbestos-containing material after such previously non-friable material becomes damaged to the extent that when dry it may be crumbled, pulverized, or reduced to powder by hand pressure.

(7) Local educational agency

The term "local educational agency" means —

(A) any local educational agency as defined in section 198 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381),

(B) the owner of any private, nonprofit elementary or secondary school building, and

(C) the governing authority of any school operated under the defense dependents' education system provided for under the Defense Dependents' Education Act of 1978 (20 U.S.C. 921 et seq.).

(8) Most current guidance document

The term "most current guidance document" means the Environmental Protection Agency's "Guidance for

Controlling Asbestos-Containing Material in Buildings" as modified by the Environmental Protection Agency after March 31, 1986.

(9) Non-profit elementary or secondary school

The term "non-profit elementary or secondary school" means any elementary or secondary school (as defined in section 2854 of Title 20) owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(10) Public and commercial building

The term "public and commercial building" means any building which is not a school building, except that the term does not include any residential apartment building of fewer then 10 units.

(11) Response action

The term "response action" means methods that protect human health and the environment from asbestos-containing material. Such methods include methods describedin chapters 3 and 5 of the Environmental Protection Agency's "Guidance for Controlling Asbestos-Containing Materials in Buildings."

(12) School

The term "school" means any elementary or secondary school as defined in section 2854 of Title 20.

(13) School building

The term "school building" means —

(A) any structure suitable for use as a classroom, including a school facility such as a laboratory, library, school eating facility, or facility used for the preparation of food,

(B) any gymnasium or other facility which is especially designed for athletic or recreational activities for an academic course in physical education,

(C) any other facility used for the instruction of students or for the administration of educational or research programs, and

(D) any maintenance, storage, or utility facility, including any hallway, essential to the operation of any facility described in subparagraphs (A), (B), or (C).

(14) State

The term "State" means a State, the District of Columbia, The Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Marianas, the Trust Territory of the Pacific Islands, and the Virgin Islands. (Pub.L. 94-469, Title II, § 202, as added Pub.L. 99-519 § 2, Oct. 22, 1986, 100 Stat. 2971.)

§ 2643. Environmental Protection Agency regulations

(a) In general

Within 360 days after October 22, 1986, the Administrator shall promulgate regulations as described in subsections (b) through (i) of this section. With respect to regulations described in subsections (b), (c), (d), (e), (f), (g), and (i) of this section, the Administrator shall issue an advanced notice of proposed rulemaking within 60 days after October 22, 1986, and shall propose regulations within 180 days after such date. Any regulation promulgated under this section must protect human health and the environment.

(b) Inspection

The Administrator shall promulgate regulations which prescribe procedures, including the use of personnel accredited under section 2646(b) or (c) of this title and laboratories accredited under section 2646(d) of this title, for determining whether asbestos-containing material is present in a school building under the authority of a local educational agency. The regulations

shall provide for the exclusion of any school building, or portion or a school building, if (1) an inspection of such school building (or portion) was completed before the effective date of the regulations, and (2) the inspection meets the procedures and other requirements of the regulations under this subchapter or of the "Guidance for Controlling Asbestos-Containing Materials in Buildings" (unless the Administrator determines that an inspection in accordance with the guidance document is inadequate). The regulations shall require inspection of any school building (or portion of a school building) that is not excluded by the preceding sentence.

(c) Circumstances requiring response actions

(1) The Administrator shall promulgate regulations which define the appropriate response action in a school building under the authority of a local educational agency in at least the following circumstances:

(A) Damage

Circumstances in which friable asbestos-containing material or its covering is damaged, deteriorated, or delaminated.

(B) Significant damage

Circumstances in which friable asbestos-containing material or its covering is significantly damaged, deteriorated, or delaminated.

(C) Potential damage

Circumstances in which —

(i) friable asbestos-containing material is in an area regularly used by building occupants, including maintenance personnel, in the course of their normal activities, and

(ii) there is a reasonable likelihood that the material or its covering will become damaged, deteriorated, or delaminated.

(D) Potential significant damage

Circumstances in which —

(i) friable asbestos-containing material is in an area regularly used by building occupants, including maintenance personnel, in the course of their normal activities, and

(ii) there is a reasonable likelihood that the material or its covering will become significantly damaged, deteriorated, or delaminated.

(2) In promulgating such regulations, the Administrator shall consider and assess the value of various technologies intended to improve the decisionmaking process regarding response actions and the quality of any work that is deemed necessary, including air monitoring and chemical encapsulants.

(d) Response actions

(1) In general

The Administrator shall promulgate regulations describing a response action in a school building under the authority of a local educational agency, using the least burdensome methods which protect human health and the environment. In determining the least burdensome methods, the Administrator shall take into account local circumstances, including occupancy and use patterns within the school building and short- and long-term costs.

(2) Response action for damaged asbestos

In the case of a response action for the circumstances described in subsection (c)(1)(A) of this section, methods for responding shall include methods identified

in chapters 3 and 5 of the "Guidance for Controlling Asbestos-Containing Material in Buildings."

(3) Response action for significantly damaged asbestos

In the case of a response action for the circumstances described in subsection (c)(1)(B) of this section, methods for responding shall include methods identified in chapter 5 of the "Guidance for Controlling Asbestos-Containing Material in Buildings."

(4) Response action for potentially damaged asbestos

In the case of a response action for the circumstances described in subsection (c)(1)(C), of this section, methods for responding shall include methods identified in chapters 3 and 5 of the "Guidance for Controlling Asbestos-Containing Material in Buildings," unless preventive measures will eliminate the reasonable likelihood that the asbestos-containing material will become damaged, deteriorated, or delaminated.

(5) Response action for potentially significantly damaged asbestos

In the case of a response action for the circumstances described in subsection (c)(1)(D) of this section, methods for responding shall include methods identified in chapter 5 of the "Guidance for Controlling Asbestos-Containing Material in Buildings," unless preventive measures will eliminate the reasonable likelihood that the asbestos-containing material will become significantly damaged, deteriorated, or delaminated.

(6) Preventive measures defined

For purposes of this section, the term "preventive measures" means actions which eliminate the reasonable likelihood of asbestos-containing material becoming damaged, deteriorated, or delaminated, or significantly damaged, deteriorated, or delaminated (as the case may be) or which protect human health and the environment.

(e) Implementation

The Administrator shall promulgate regulations requiring the implementation of response actions in school buildings under the authority of a local educational agency and, where appropriate, for the determination of when a response action is completed. Such regulations shall include standards for the education and protection of both workers and building occupants for the following phases of activity:

(1) Inspection.

(2) Response Action.

(3) Post-response action, including any periodic reinspection of asbestos-containing material and long-term surveillance activity.

(f) Operations and maintenance

The Administrator shall promulgate regulations to require implementation of an operations and maintenance and repair program as described in chapter 3 of the "Guidance for Controlling Asbestos-Containing Materials in Buildings" for all friable asbestos-containing material in a school building under the authority of a local educational agency.

(g) Periodic surveillance

The Administrator shall promulgate regulations to require the following:

(1) An identification of the location of friable and non-friable asbestos in a school building under the authority of a local educational agency.

(2) Provisions for surveillance and periodic reinspection of such friable and non-friable asbestos.

(3) Provisions for education of school employees, including school service and maintenance personnel, about the location of and safety procedures with respect to such friable and non-friable asbestos.

(h) Transportation and disposal

The Administrator shall promulgate regulations which prescribe standards for transportation and disposal of asbestos-containing waste material to protect human health and the environment. Such regulations shall include such provisions related to the manner in which transportation vehicles are loaded and unloaded as will assure the physical integrity of containers of asbestos-containing waste material.

(i) Management plans

(1) In general

The administrator shall promulgate regulations which require each local educational agency to develop an asbestos management plan for school buildings under its authority, to begin implementation of such plan within 990 days after October 22, 1986, and to complete implementation of such plan in a timely fashion. The regulations shall require that each plan include the following elements, wherever relevant to the school building:

(A) An inspection statement describing inspection and response action activities carried out before October 22, 1986.

(B) A description of the results of the inspection conducted pursuant to regulations under subsection (b) of this section, including a description of the specific areas inspected.

(C) A detailed description of measures to be taken to respond to any friable asbestos-containing material pursuant to the regulations promulgated

under subsections (c), (d), and (e) of this section, including the location or locations at which a response action will be taken, the method or methods of response action to be used, and a schedule for beginning and completing response actions.

(D) A detailed description of any asbestos-containing material which remains in the school building once response actions are undertaken pursuant to the regulations promulgated under subsections (c), (d), and (e) of this section.

(E) A plan for periodic reinspection and long-term surveillance activities developed pursuant to regulations promulgated under subsection (g) of this section, and a plan for operations and maintenance activities developed pursuant to regulations promulgated under subsection (f) of this section.

(F) With respect to the person or persons who inspected for asbestos-containing material and who will design or carry out response actions with respect to the friable asbestos-containing material, one of the following statements:

(i) If the State has adopted a contractor accreditation plan under section 2646(b) of this title, a statement that the person (or persons) is accredited under such plan.

(ii) A statement that the local educational agency used (or will use) persons who have been accredited by another State which has adopted a contractor accreditation plan under section 2646(b) of this title or is accredited pursuant to an Administrator-approved course under section 2646(c) of this title.

(G) A list of the laboratories that analyzed any bulk samples of asbestos-containing material found in the school building or air samples taken to detect

asbestos in the school building and a statement that each laboratory has been accredited pursuant to the accreditation program under section 2646(d) of this title.

(H) With respect to each consultant who contributed to the management plan, the name of the consultant and one of the following statements:

(i) If the State has adopted a contractor accreditation plan under section 2646(b) of this title, a statement that the consultant is accredited under such plan.

(ii) A statement that the contractor is accredited by another State which has adopted a contractor accreditation plan under section 2646(b) of this title or is accredited pursuant to an Administrator-approved course under section 2646(c) of this title.

(I) An evaluation of resources needed to successfully complete response actions and carry out reinspection, surveillance, and operation and maintenance activities.

(2) Statement by contractor

A local educational agency may require each management plan to contain a statement signed by an accredited asbestos contractor that such contractor has prepared or assisted in the preparation of such plan, or has reviewed such plan, and that such plan is in compliance with the applicable regulations and standards promulgated or adopted pursuant to this section and other applicable provisions of law. Such a statement may not be signed by a contractor who, in addition to preparing or assisting in preparing the management plan, also implements (or will implement) the management plan.

(3) Warning labels

(A) The regulations shall require that each local educational agency which has inspected for and discovered any asbestos-containing material with respect to a school building shall attach a warning label to any asbestos-containing material still in routine maintenance areas (such as boiler rooms) of the school building, including —

(i) friable asbestos-containing material which was responded to by a means other than removal, and

(ii) asbestos-containing material for which no response action was carried out.

(B) The warning label shall read, in print which is readily visible because of large size or bright color, as follows: "CAUTION: ASBESTOS. HAZARDOUS. DO NOT DISTURB WITHOUT PROPER TRAINING AND EQUIPMENT."

(4) Submission of plan in stages

A local educational agency may submit a management plan in stages, with each submission of the agency covering only a portion of the school buildings under the agency's authority, if the agency determines that such action would expedite the identification and abatement of hazardous asbestos-containing material in the school buildings under the authority of the agency.

(5) Public Availability

A copy of the management plan developed under the regulations shall be available in the administrative offices of the local educational agency for inspection by the public, including teachers, other school personnel, and parents. The local educational agency shall notify parent, teacher, and employee organizations of the availability of such plan.

(6) Submission to State Governor

Each plan developed under this subsection shall be submitted to the State Governor under section 2645 of this title.

(j) Changes in regulations

Changes may be made in the regulations promulgated under this section only by rule in accordance with section 553 of Title 5. Any such change must protect human health and the environment.

(k) Change in Guidance Document

Any change made in the "Guidance for Controlling Asbestos-Containing Material in Buildings" shall be made only by rule in accordance with section 553 of Title 5, unless a regulation described in this section dealing with the same subject matter is in effect. Any such change must protect human health and the environment.

(l) Treatment of Department of Defense schools

(1) Secretary to act in lieu of Governor

In the administration of this subchapter, any function, duty, or other responsibility imposed on a Governor of a State shall be carried out by the Secretary of Defense with respect to any school operated under the defense dependents' education system provided for under the Defense Dependents' Education Act of 1978 (20 U.S.C. 921 et seq.).

(2) Regulations

The Secretary of Defense, in cooperation with the Administrator, shall, to the extent feasible and consistent with the national security, take such action as may be necessary to provide for the identification, inspection, and management (including abatement) of asbestos in any building used by the Department of Defense as an overseas school for dependents of members of the

Armed Forces. Such identification, inspection, and management (including abatement) shall, subject to the preceding sentence, be carried out in a manner comparable to the manner in which a local educational agency is required to carry out such activities with respect to a school building under this subchapter.

(m) Waiver

The Administrator, upon request by a Governor and after notice and comment and opportunity for a public hearing in the affected State, may waive some or all of the requirements of this section and section 2644 of this title with respect to such State if it has established and is implementing a program of asbestos inspection and management that contains requirements that are at least as stringent as the requirements of this section and section 2644 of this title.

(Pub.L. 94-469, Title II, § 203, as added Pub.L. 99-519, § 2, Oct. 22, 1986, 100 Stat. 2972).

§ 2644. Requirements upon failure of EPA to promulgate regulations

(a) In general

(1) Failure to promulgate

If the Administrator fails to promulgate within the prescribed period —

(A) regulations described in section 2643(b) of this title (relating to inspection);

(B) regulations described in section 2643(c), (d), (e), (f), (g), and (i) of this title (relating to responding to asbestos); or

(C) regulations described in section 2643(h) of this title (relating to transportation and disposal);

each local educational agency shall carry out the requirements described in this section in subsection (b) of this section; subsections (c), (d), and (e) of this section; or subsection (f) of this section; respectively, in accordance with the Environmental Protection Agency's most current guidance document.

(2) Stay by court

If the Administrator has promulgated regulations described in paragraph (1)(A), (B), or (C) within the prescribed period, but the effective date of such regulations has been stayed by a court for a period of more than 30 days, a local educational agency shall carry out the pertinent requirements described in this subsection in accordance with the Environmental Protection Agency's most current guidance document.

(3) Effective period

The requirements of this section shall be in effect until such time as the Administrator promulgates the pertinent regulations or until the stay is lifted (as the case may be).

(b) Inspection

(1) Except as provided in paragraph (2), the local educational agency, within 540 days after October 22, 1986, shall conduct an inspection for asbestos-containing material, using personnel accredited under section 2646(b) or (c) of this title and laboratories accredited under section 2646(d) of this title, in each school building under its authority.

(2) The local educational agency may exclude from the inspection requirement in paragraph (1) any school building, or portion of a school building, if (A) an inspection of such school building (or portion) was completed before the date on which this section goes into effect, and (B) the inspection meets the inspection requirements of this section.

(c) Operation and maintenance

The local educational agency shall, within 720 days after October 22, 1986 develop and begin implementation of an operation and maintenance plan with respect to friable asbestos-containing material in a school building under its authority. Such plan shall provide for the education of a school service and maintenance personnel about safety procedures with respect to asbestos-containing material, including friable asbestos-containing material.

(d) Management Plan

(1) In general
The local educational agency shall —

(A) develop a management plan for responding to asbestos-containing material in each school building under its authority and submit such plan to the Governor under section 2645 of this title within 810 days after October 22, 1986, and

(B) begin implementation of such plan within 990 days after October 22, 1986, and

(C) complete implementation of such plan in a timely fashion.

(2) Plan requirements
The management plan shall —

(A) include the elements listed in section 2643(i)(1) of this title, including an inspection statement as described in paragraph (3) of this section,

(B) provide for the attachment of warning labels as described in section 2643(i)(3) of this title,

(C) be prepared in accordance with the most current guidance document,

(D) meet the standard described in paragraph (4) for actions described in that paragraph, and

(E) be submitted to the State Governor under section 2645 of this title.

(3) Inspection statement

The local educational agency shall complete an inspection statement, covering activities carried out before October 22, 1986, which meets the following requirements:

(A) The statement shall include the following information:

(i) The dates of inspection.

(ii) The name, address, and qualifications of each inspector.

(iii) A description of the specific areas inspected.

(iv) A list of the laboratories that analyzed any bulk samples of asbestos-containing material or air samples of asbestos found in any school building and a statement describing the qualifications of each laboratory.

(v) The results of the inspection.

(B) The statement shall state whether any actions were taken with respect to any asbestos-containing material found to be present, including a specific reference to whether any actions were taken in the boiler room of the building. If any such action was taken, the following items of information shall be included in the statement:

(i) The location or locations at which the action was taken.

(ii) A description of the method of action.

(iii) The qualifications of the persons who conducted the action.

(4) Standard

The ambient interior concentration of asbestos after the completion of actions described in the most current guidance document, other than the type of action described in sections 2643(f) of this title and subsection (c) of this section, shall not exceed the ambient exterior concentration, discounting any contribution for any local stationary source. Either a scanning electron microscope or a transmission electron microscope shall be used to determine the ambient interior concentration. In the absence of reliable measurements, the ambient exterior concentration shall be deemed to be —

(A) less than 0.003 fibers per cubic centimeter if a scanning electron microscope is used, and

(B) less than 0.005 fibers per cubic centimeter if a transmission electron microscope is used.

(5) Public availability

A copy of the management plan shall be available in the administrative offices of the local educational agency for inspection by the public, including teachers, other school personnel, and parents. The local educational agency shall notify parent, teacher, and employee organizations of the availability of such plan.

(e) Building occupant protection

The local educational agency shall provide for the protection of building occupants during each phase of activity described in this section.

(f) Transportation and disposal

The local educational agency shall provide for the transportation and disposal of asbestos in accordance with the most recent version of the Environmental

Protection Agency's "Asbestos Waste Management Guidance" (or any successor to such document).

(Pub.L. 94-469, Title II, § 204, as added Pub.L. 99-519, § 2, Oct. 22, 1986, 100 Stat. 2977.)

§ 2645. Submission of management plan to State Governor

(a) Time for submission

Within 720 days after Oct. 22, 1986 (or within 310 days if there are no regulations under section 2643(i) of this title) a local educational agency shall submit a management plan developed pursuant to regulations promulgated under section 2643(i) of this title (or under section 2644(d) of this title if there are no regulations) to the Governor of the State in which the local educational agency is located.

(b) Duties of Governor

Within 360 days after Oct. 22, 1986, the Governor of each State —

(1) shall notify local educational agencies in the State of where to submit their management plans under this section, and

(2) may establish administrative procedures for reviewing management plans submitted under this section.

If the Governor establishes procedures under paragraph (2), the Governor shall designate to carry out the reviews those State officials who are responsible for implementing environmental protection or other public health programs, or with authority over asbestos programs, in the State.

(c) Management plan review

(1) Grounds for disapproval of plan

The Governor may disapprove a management plan within 90 days after the date of receipt of the plan if the plan —

(A) does not conform with the regulations under section 2643(i) of this title (or with section 2644(d) of this title if there are no regulations),

(B) does not assure that contractors who are accredited pursuant to this subchapter will be used to carry out the plan, or

(C) does not contain a response action schedule which is reasonable and timely, taking into account circumstances relevant to the speed at which the friable asbestos-containing material in the school buildings under the local education agency's authority should be responded to, including human exposure to the asbestos while the friable asbestos-containing material remains in the school building, and the ability of the local educational agency to continue to provide educational services to the community.

(2) Revision of plan

If the State Governor disapproves a plan, the State Governor shall explain in writing to the local educational agency the reasons why the plan was disapproved and the changes that need to be made in the plan. Within 30 days after the date on which notice is received of disapproval of its plan, the local educational agency shall revise the plan to conform with the State Governor's suggested changes. The Governor may extend the 30-day period for not more than 90 days.

(Pub.L. 94-469, Title II, § 205, as added Pub.L. 99-519, § 2, Oct. 22, 1986, 100 Stat. 2979.)

§ 2646. Contractor and laboratory accreditation

(a) Necessity for accreditation

A person may not —

(1) inspect for asbestos-containing material in a school building under the authority of a local educational agency,

(2) prepare a management plan for such a school, or

(3) design or conduct response actions, other than the type of action described in sections 2643(f) and 2644(c) of this title, with respect to friable asbestos-containing material in such a school,

unless such person is accredited by a State under subsection (b) of this section or is accredited pursuant to an Administrator-approved course under subsection (c) of this section.

(b) Accreditation by State

(1) Model plan

(A) Persons to be accredited

Within 180 days after October 22, 1986, the Administrator, in consultation with affected organizations, shall develop a model contractor accreditation plan for States to give accreditation to persons in the following categories:

(i) Persons who inspect for asbestos-containing material in school buildings under the authority of a local educational agency.

(ii) Persons who prepare management plans for such schools.

(iii) Persons who design or carry out response actions, other than the type of action

described in sections 2643(f) and 2644(c) of this title, with respect to friable asbestos-containing material in such schools.

(B) Plan requirements

The plan shall include a requirement that any person in a category listed in paragraph (1) achieve a passing grade on an examination and participate in continuing education to stay informed about current asbestos inspection and response action technology. The examination shall demonstrate the knowledge of the person in areas that the Administrator prescribes as necessary and appropriate in each of the categories. Such examinations may include requirements for knowledge in the following areas:

(i) Recognition of asbestos-containing material and its physical characteristics.

(ii) Health hazards of asbestos and the relationship between asbestos exposure and disease.

(iii) Assessing the risk of asbestos exposure through a knowledge of percentage weight of asbestos-containing material, friability, age, deterioration, location and accessibility of materials, and advantages and disadvantages of dry and wet response action methods.

(iv) Respirators and their use, care, selection, degree of protection afforded, fitting, testing, and maintenance and cleaning procedures.

(v) Appropriate work practices and control methods, including the use of high efficiency particle absolute vacuums, the use of amended water, and principles of negative air pressure equipment use and procedures.

(vi) Preparing a work area for response action work, including isolating work areas to prevent bystander or public exposure to asbestos, decontamination procedures, and procedures for dismantling work areas after completion of work.

(vii) Establishing emergency procedures to respond to sudden releases.

(viii) Air monitoring requirements and procedures.

(ix) Medical surveillance program requirements.

(x) Proper asbestos waste transportation and disposal procedures.

(xi) Housekeeping and personal hygiene practices, including the necessity of showers, and procedures to prevent asbestos exposure to an employee's family.

(2) State adoption of plan

Each state shall adopt a contractor accreditation plan at least as stringent as the model plan developed by the Administrator under paragraph (1), within 180 days after the commencement of the first regular session of the legislature of such State which is convened following the date on which the Administrator completes development of the model plan. In the case of a school operated under the defense dependents' education system provided for under the Defense Dependents' Education Act of 1978 (20 U.S.C. 921 et seq.),the Secretary of Defense shall adopt a contractor accreditation plan at least as stringent as that model.

(c) Accreditation by administrator-approved course

(1) Course approval

Within 180 days after October 22, 1986, the Administrator shall ensure that any Environmental Protection Agency-approved asbestos training course is consistent with the model plan (including testing requirements) developed under subsection (b) of this section. A contractor may be accredited by taking and passing such a course.

(2) Treatment of persons with previous EPA asbestos training

A person who —

(A) completed an Environmental Protection Agency-approved asbestos training course before October 22, 1986, and

(B) passed (or passes) an asbestos test either before or after October 22, 1986,

may be accredited under paragraph (1) if the Administrator determines that the course and test are equivalent to the requirements of the model plan developed under subsection (b) of this section. If the Administrator so determines, the person shall be considered accredited for the purposes of this subchapter until a date that is one year after the date on which the State in which such person is employed establishes an accreditation program pursuant to subsection (b) of this section.

(3) List of courses

The Administrator, in consultation with affected organizations, shall publish (and revise as necessary) —

(A) a list of asbestos courses and tests in effect before October 22, 1986, which qualify for equivalency treatment under paragraph (2), and

(B) a list of asbestos courses and tests which the Administrator determines under paragraph (1)

are consistent with the model plan and which will qualify a contractor for accreditation under such paragraph.

(d) Laboratory accreditation

(1) The administrator shall provide for the development of an accreditation program for laboratories by the National Bureau of Standards in accordance with paragraph (2). The administrator shall transfer such funds as are necessary to the National Bureau of Standards to carry out such program.

(2) The National Bureau of Standards, upon request by the Administrator, shall, in consultation with affected organizations —

(A) within 360 days after October 22, 1986, develop an accreditation program for laboratories which conduct qualitative and semi-quantatative analyses of bulk samples of asbestos-containing material. and

(B) within 720 days after October 22, 1986, develop an accreditation program for laboratories which conduct analyses of air samples of asbestos from school buildings under the authority of a local educational agency.

(3) A laboratory which plans to carry out any such analysis shall comply with the requirements of the accreditation program.

(e) Financial assistance contingent on use of accredited persons

(1) A school which is an applicant for financial assistance under section 505 of the Asbestos School Hazard Abatement Act of 1984 [20 U.S.C.A. § 4011] is not eligible for such assistance unless the school, in carrying out the requirements of this subchapter —

(A) uses a person (or persons) —

(i) who is accredited by a State which has adopted an accreditation plan based on the model plan developed under subsection (b) of this section, or

(ii) who is accredited pursuant to an Administrator-approved course under subsection (c) of this section, and

(B) uses a laboratory (or laboratories) which is accredited under the program developed under subsection (d) of this section.

(2) This subsection shall apply to any financial assistance provided under the Asbestos School Hazard Abatement Act of 1984 for activities performed after the following dates:

(A) In the case of activities performed by persons, after the date which is one year after October 22, 1986.

(B) In the case of activities performed by laboratories, after the date which is 180 days after the date on which a laboratory accreditation program is completed under subsection (d) of this section.

(Pub.L. 94-469, Title II, § 206, as added Pub.L. 99-519, § 2, Oct. 22, 1986, 100 Stat. 2980.)

§ 2647. Enforcement

(a) Penalties

Any local educational agency —

(1) which fails to conduct an inspection pursuant to regulations under section 2643(b) of this title or under section 2644(b) of this title,

(2) which knowingly submits false information to the Governor regarding any inspection pursuant to regulations under section 2643(i) of this title or knowingly

includes false information in any inspection statement under section 2644(d)(3) of this title, or

(3) which fails to develop a management plan pursuant to regulations under section 2643(i) of this title or under section 2644(d) of this title,

is liable for a civil penalty of not more than $5,000 for each day during which the violation continues. Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of this title. For purposes of this subsection, a "violation" means a failure to comply with respect to a single school building. The court shall order that any civil penalty collected under this subsection be used by the local educational agency for purposes of complying with this subchapter. Any portion of a civil penalty remaining unspent after compliance by a local educational agency is completed shall be deposited into the Asbestos Trust Fund established by section 5 of the Asbestos Hazard Emergency Response Act of 1986.

(b) Relationship to Subchapter I

A local educational agency is not liable for any civil penalty under subchapter I of this subchapter for failing or refusing to comply with any rule promulgated or order issued under this subchapter.

(c) Enforcement considerations

(1) In determining the amount of a civil penalty to be assessed under subsection (a) of this section against a local educational agency, the Administrator shall consider —

(A) the significance of the violation;

(B) the culpability of the violator, including any history of previous violations under this chapter;

(C) the ability of the violator to pay the penalty; and

(D) the ability of the violator to continue to provide educational services to the community.

(2) Any action ordered by a court in fashioning relief under section 2619 of this title shall be consistent with regulations promulgated under section 2643 of this title (or with the requirements of section 2644 of this title if there are no regulations).

(d) Citizen complaints

Any person may file a complaint with the Administrator or with the Governor of the State in which the school building is located with respect to asbestos-containing material in a school building. If the Administrator or Governor receives a complaint under this subsection containing allegations which provide a reasonable basis to believe that a violation of this chapter has occurred, the Administrator or Governor shall investigate and respond (including taking enforcement action where appropriate) to the complaint within a reasonable period of time.

(e) Citizen petitions

(1) Any person may petition the Administrator to initiate a proceeding for the issuance, amendment, or repeal or a regulation or order under this subchapter.

(2) Such petition shall be filed in the principal office of the Administrator and shall set forth the facts which it is claimed establish that it is necessary to issue, amend, or repeal a regulation or order under this subchapter.

(3) The Administrator may hold a public hearing or may conduct such investigation or proceeding as the Administrator deems appropriate in order to determine whether or not such petition should be granted.

(4) Within 90 days after filing of a petition described in paragraph (1), the Administrator shall either grant or deny the petition. If the Administrator grants such petition, the Administrator shall promptly commence an appropriate proceeding in accordance with this subchapter. If the Administrator denies such petition, the Administrator shall publish in the Federal Register the Administrator's reasons for such denial. The granting or denial of a petition under this subsection shall not affect any deadline or other requirement of this subchapter.

(f) Citizens civil actions with respect to EPA regulations

(1) Any person may commence a civil action without prior notice against the Administrator to compel the Administrator to meet the deadlines in section 2643 of this title for issuing advanced notices of proposed rulemaking, proposing regulations, and promulgating regulations. Any such action shall be brought in the district court of the United States for the District of Columbia.

(2) In any action brought under paragraph (1) in which the court finds the Administrator to be in violation of any deadline in section 2643 of this title, the court shall set forth a schedule for promulgating the regulations required by section 2643 of this title and shall order the Administrator to comply with such schedule. The court may extend any deadline (which has not already occurred) in section 2644(b), 2644(c), or 2644(d) of this title for a period of not more than 6 months, if the court-ordered schedule will result in final promulgation of the pertinent regulations within the extended period. Such deadline extensions may not be granted by the court beginning 720 days after October 22, 1986.

(3) Section 2619 of this title shall apply to civil actions described in this subsection, except to the extent inconsistent with this subsection.

(Pub.L. 94-469, Title II, § 207, as added Pub.L. 99-519,

§ 2, Oct. 22, 1986, 100 Stat. 2983.)

§ 2648. Emergency authority

(a) Emergency action

(1) Authority of Administrator or Governor of State

Whenever —

(A) the presence of airborne asbestos or the condition of friable asbestos-containing material in a school building governed by a local educational agency poses an imminent and substantial endangerment to human health or the environment, and

(B) the local educational agency is not taking sufficient action (as determined by the Administrator or the Governor) to respond to the airborne asbestos or friable asbestos-containing material,

the Administrator or the Governor of a State is authorized to act to protect human health or the environment.

(2) Limitation on action of Governor

The Governor of a State shall notify the Administrator within a reasonable period of time before the Governor plans to take an emergency action under this subsection. After such notification, if the Administrator takes an emergency action with respect to the same hazard, the Governor may not carry out (or continue to carry out, if the action has been started) the emergency action.

(3) Notification of action

The following notification shall be provided before an emergency action is taken under this subsection:

(A) In the case of a Governor taking the action, the Governor shall notify the local educational agency concerned.

(B) In the case of the Administrator taking the action, the Administrator shall notify both the local

educational agency concerned and the Governor of the State in which such agency is located.

(4) Cost recovery

The Administrator or the Governor of a State may seek reimbursement for all costs of an emergency action taken under this subsection in the United States District Court for the District of Columbia or for the district in which the emergency action occurred. In any action seeking reimbursement from a local educational agency, the action shall be brought in the United States District Court for the district in which the local educational agency is located.

(b) Injunctive relief

Upon receipt of evidence that the presence of airborne asbestos or the condition of friable asbestos-containing material in a school building governed by a local educational agency poses an imminent and substantial endangerment to human health or the environment —

(1) the Administrator may request the Attorney General to bring suit, or

(2) the Governor of a State may bring suit,

to secure such relief as may be necessary to respond to the hazard. The district court of the United States in the district in which the response will be carried out shall have jurisdiction to grant such relief, including injunctive relief.

(Pub.L. 94-469, Title II, § 208, as added Pub.L. 99-519, § 2, Oct. 22, 1986, 100 Stat. 2985.)

§ 2649. Preemption

(a) Construction of provisions as not preempting other laws

Nothing in this subchapter shall be construed, interpreted, or applied to preempt, displace, or supplant any other State or Federal law, whether statutory or common.

(b) Award of costs and damage awards

Nothing in this subchapter or any standard, regulation, or requirement promulgated pursuant to this subchapter shall be construed or interpreted to preclude any court from awarding costs and damages associated with the abatement, including the removal, of asbestos-containing material, or a portion of such costs, at any time prior to the actual date on which such material is removed.

(c) Construction of provisions as not prohibiting more stringent State requirements

Nothing in this subchapter shall be construed or interpreted as preempting a State from establishing any additional liability or more stringent requirements with respect to asbestos in school buildings within such State.

(d) Creation of cause of action

Nothing in this subchapter creates a cause of action or in any other way increases or diminishes the liability of any person under any other law.

(e) Effect of provisions in civil action for damages

It is not the intent of Congress that this subchapter or rules, regulations, or orders issued pursuant to this subchapter be interpreted as influencing, in either the

plaintiff's or defendant's favor, the disposition of any civil action for damages relating to asbestos. This subsection does not affect the authority of any court to make a determination in any adjudicatory proceeding under applicable State law with respect to the admission into evidence or any other use of this subchapter or rules, regulations, or orders issued pursuant to this subchapter.

(Pub.L. 94-469, Title II, § 209, as added Pub.L. 99-519, § 2, Oct. 22, 1986, 100 Stat. 2986.)

§ 2650. Liability Insurance for asbestos contractors and local educational agencies

(a) Study of availability

(1) Contents of study

The Administrator shall conduct a study on the availability of liability insurance and other forms of assurance against financial loss which are available to local educational agencies and asbestos contractors with respect to actions required under this subchapter. Such study shall examine the following:

(A) The extent to which liability insurance and other forms of assurance against financial loss are available to local educational agencies and asbestos contractors.

(B) The extent to which the cost of insurance or other forms of assurance against financial loss has increased and the extent to which coverage has become less complete.

(C) The extent to which any limitation in the availability of insurance or other forms of assurance against financial loss is the result of factors other than standards of liability in applicable law.

(D) The extent to which the existence of the regulations required by subsections (c) and (d) of

section 2643 of this title and the accreditation of contractors under section 2646 of this title has affected the availability or cost of insurance or other forms of assurance against financial loss.

(E) The extent to which any limitation on the availability of insurance or other forms of assurance against financial loss is inhibiting inspections for asbestos-containing material or the development or implementation of management plans under this subchapter.

(F) Identification of any other impediments to the timely completion of inspections or the development and implementation of management plans under this subchapter.

(2) Interim Report

Not later than April 1, 1988, the Administrator shall submit to the Congress an interim report on the progress of the study required by this subsection, along with preliminary findings based on information collected to that date.

(3) Final Report

Not later than October 1, 1990, the Administrator shall submit to the Congress a final report on the study required by this subsection, including final findings based on the information collected.

(b) State action

On the basis of the interim report or the final report of the study required by subsection (a) of this section, a State may enact or amend State law to establish or modify a standard of liability for local educational agencies or asbestos contractors with respect to actions required under this subchapter.

(Pub.L. 94-469, Title II, § 210, as added Pub.L. 99-519, § 2, Oct. 22, 1986, 100 Stat. 2986.)

§ 2651. Discrimination by State or local educational agency

(a) Information relating to potential violations

No State or local educational agency may discriminate against a person in any way, including firing a person who is an employee, because the person provided information relating to a potential violation of this subchapter to any other person, including a State or the Federal Government.

(b) Review of discriminatory action

Any public or private employee or representative of employees who believes he or she has been fired or otherwise discriminated against in violation of subsection (a) of this section may within 90 days after the alleged violation occurs apply to the Secretary of Labor for a review of the firing or alleged discrimination. The review shall be conducted in accordance with section 660(c) of Title 29.

(Pub.L. 94-469, Title II, § 211, as added Pub.L. 99-519, § 2, Oct. 22, 1986, 100 Stat. 2987.)

§ 2652. Asbestos Ombudsman

(a) Appointment

The Administrator shall appoint an Asbestos Ombudsman, who shall carry out the duties described in subsection (b) of this section.

(b) Duties

The duties of the Asbestos Ombudsman are —

(1) to receive complaints, grievances, and requests for information submitted by any person with respect to any aspect of this subchapter,

(2) to render assistance with respect to the complaints, grievances, and requests received, and

(3) to make such recommendations to the Administrator as the Ombudsman considers appropriate.

(Pub.L. 94-469, Title II, § 212, as added Pub.L. 99-519, § 2, Oct. 22, 1986, 100 Stat. 2987.)

§ 2653. Study of asbestos-containing material in public buildings

Within 360 days after October 22, 1986, the Administrator shall conduct and submit to the Congress the results of a study which shall —

(1) assess the extent to which asbestos-containing materials are present in public and commercial buildings;

(2) assess the condition of asbestos-containing material in commercial buildings and the likelihood that persons occupying such buildings, including service and maintenance personnel, are, or may be, exposed to asbestos fibers;

(3) consider and report on whether public and commercial buildings should be subject to the same inspection and response action requirements that apply to school buildings;

(4) assess whether existing Federal regulations adequately protect the general public, particularly abatement personnel, from exposure to asbestos during renovation and demolition of such buildings; and

(5) include recommendations that explicitly address whether there is a need to establish standards for, and regulate asbestos exposure in, public and commercial buildings.

(Pub.L. 94-469, Title II, § 213, as added Pub.L. 99-519, § 2, Oct. 22, 1986, 100 Stat. 2987.)

§ 2654 Transitional rules

Any regulation of the Environmental Protection Agency under subchapter I of this chapter which is inconsistent with this subchapter shall not be in effect after October 22, 1986. Any advance notice of proposed rulemaking, any proposed rule, and any regulation of the Environmental Protection Agency in effect before October 22, 1986 which is consistent with the regulations required under section 2643 of this title shall remain in effect and may be used to meet the requirements of section 2643 of this title, except that any such regulation shall be enforced under this chapter.

(Pub.L. 94-469, Title II, § 214, as added Pub.L. 99-519, § 2, Oct. 22, 1986, 100 Stat. 2988.)

TEXT OF EPA'S REGULATIONS CONCERNING ASBESTOS-CONTAINING MATERIALS IN SCHOOLS, 40 C.F.R. § 763.80, *et seq.*

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Appendix A to Subpart E — Interim

Transmission Electron Microscopy Analytical Methods — Mandatory and Nonmandatory — and Mandatory Section to Determine Completion of Response Actions

Appendix B to Subpart E — Work Practices and Engineering Controls for Small-Scale, Short-Duration Operations Maintenance and Repair (O&M) Activities Involving ACM

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Appendix D to Subpart E — Transport and Disposal of Asbestos Waste

§ 763.80 Scope and purpose.

(a) This rule requires local education agencies to identify friable and nonfriable asbestos-containing material (ACM) in public and private elementary and secondary schools by visually inspecting school buildings for such materials, sampling such materials if they are not assumed to be ACM, and having samples analyzed by appropriate techniques referred to in this rule. The rule requires local education agencies to submit management plans to the Governor of their State by October 12, 1988, begin to implement the plans by July 9, 1989, and complete implementation of the plans in a timely fashion. In addition, local education agencies are required to use persons who have been accredited to conduct inspections, reinspection, develop management plans, or perform response actions. The rule also includes recordkeeping requirements. Local education agencies may contractually delegate their duties under this rule, but they remain responsible for the proper performance of those duties. Local education agencies are encouraged to consult with EPA Regional Asbestos Coordinators, or if applicable, a State's lead agency designated by the State Governor, for assistance in complying with this rule.

(b) Local education agencies must provide for the transportation and disposal of asbestos in accordance with EPA's "Asbestos Waste Management Guidance." For convenience, applicable sections of this guidance are reprinted as Appendix D of this subpart. There are regulations in place, however, that affect transportation and disposal of asbestos waste generated by this rule. The transportation of asbestos waste is covered by the Department of Transportation [49 CFR Part 173, Subpart J] and disposal is covered by the National Emissions

Standards for Hazardous Air Pollutants (NESHAP) (40 CFR Part 61, Subpart M).

§ 763.83 Definitions.

For purposes of this subpart:

"Act" means the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601, et seq.

"Accessible" when referring to ACM means that the material is subject to disturbance by school building occupants or custodial or maintenance personnel in the course of their normal activities.

"Accredited" or "accreditation" when referring to a person or laboratory means that such person or laboratory is accredited in accordance with section 206 of Title II of the Act.

"Air erosion" means the passage of air over friable ACBM which may result in the release of asbestos fibers.

"Asbestos" means the asbestiform varieties of: Chrysotile (serpentine); crocidolite (riebeckite); amosite (cummingtonitegrunerite); anthophyllite; tremolite; and actinolite.

"Asbestos-containing material" (ACM) when referring to school buildings means any material or product which contains more than 1 percent asbestos.

"Asbestos-containing building material" (ACBM) means surfacing ACM, thermal system insulation ACM, or miscellaneous ACM that is found in or on interior structural members or other parts of a school building.

"Asbestos debris" means pieces of ACBM that can be identified by color, texture, or composition, or means dust, if the dust is determined by an accredited inspector to be ACM.

"Damaged friable miscellaneous ACM" means friable miscellaneous ACM which has deteriorated or sustained physical injury such that the internal structure (cohesion) of the material is inadequate or, if applicable,

which has delaminated such that its bond to the substrate (adhesion) is inadequate or which for any other reason lacks fiber cohesion or adhesion qualities. Such damage or deterioration may be illustrated by the separation of ACM into layers; separation of ACM from the substrate; flaking, blistering, or crumbling of the ACM surface; water damage; significant or repeated water stains, scrapes, gouges, mars or other signs of physical injury on the ACM. Asbestos debris originating from the ACBM in question may also indicate damage.

"Damaged friable surfacing ACM" means friable surfacing ACM which has deteriorated or sustained physical injury such that the internal structure (cohesion) of the material is inadequate or which has delaminated such that its bond to the substrate (adhesion) is inadequate, or which, for any other reason, lacks fiber cohesion or adhesion qualities. Such damage or deterioration may be illustrated by the separation of ACM into layers; separation of ACM from the substrate; flaking, blistering, or crumbling of the ACM surface; water damage; significant or repeated water stains, scrapes, gouges, mars or other signs of physical injury on the ACM. Asbestos debris originating from the ACBM in question may also indicate damage.

"Damaged or significantly damaged thermal system insulation ACM" means thermal system insulation ACM on pipes, boilers, tanks, ducts, and other thermal system insulation equipment where the insulation has lost its structural integrity, or its covering, in whole or in part, is crushed, water-stained, gouged, punctured, missing, or not intact such that it is not able to contain fibers. Damage may be further illustrated by occasional punctures, gouges or other signs of physical injury to ACM; occasional water damage on the protective coverings/jackets; or exposed ACM ends or joints. Asbestos debris originating from the ACBM in question may also indicate damage.

"Encapsulation" means the treatment of ACBM with a material that surrounds or embeds asbestos fibers in an adhesive matrix to prevent the release of fibers, as the encapsulant creates a membrane over the surface (bridging encapsulant) or penetrates the material and binds its components together (penetrating encapsulant).

"Enclosure" means an airtight, impermeable, permanent barrier around ACBM to prevent the release of asbestos fibers into the air.

"Fiber release episode" means any uncontrolled or unintentional disturbance of ACBM resulting in visible emission.

"Friable" when referring to material in a school building means that the material, when dry, may be crumbled, pulverized, or reduced to powder by hand pressure, and includes previously nonfriable material after such previously nonfriable material becomes damaged to the extent that when dry it may be crumbled, pulverized, or reduced to powder by hand pressure.

"Functional space" means a room, group of rooms, or homogeneous area (including crawl spaces or the space between a dropped ceiling and the floor or roof deck above), such as classroom(s), a cafeteria, gymnasium, hallway(s), designated by a person accredited to prepare management plans, design abatement projects, or conduct response actions.

"High-efficiency particulate air" (HEPA) refers to a filtering system capable of trapping and retaining at least 99.97 percent of all monodispersed particles 0.3 mm in diameter or larger.

"Homogeneous area" means an area of surfacing material, thermal system insulation material, or miscellaneous material that is uniform in color and texture.

"Local education agency" means:

(1) Any local educational agency as defined in section 198 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381).

(2) The owner of any nonpublic, nonprofit elementary, or secondary school building.

(3) The governing authority of any school operated under the defense dependents' education system provided for under the Defense Dependents' Education Act of 1978 (20 U.S.C. 921, et seq.).

"Miscellaneous ACM" means miscellaneous material that is ACM in a school building.

"Miscellaneous material" means interior building material on structural components, structural members or fixtures, such as floor and ceiling tiles, and does not include surfacing material or thermal system insulation.

"Nonfriable" means material in a school building which when dry may not be crumbled, pulverized, or reduced to powder by hand pressure.

"Operations and maintenance program" means a program of work practices to maintain friable ACBM in good condition, ensure clean up of asbestos fibers previously released, and prevent further release by minimizing and controlling friable ACBM disturbance or damage.

"Potential damage" means circumstances in which:

(1) Friable ACBM is in an area regularly used by building occupants, including maintenance personnel, in the course of their normal activities.

(2) There are indications that there is a reasonable likelihood that the material or its covering will become damaged, deteriorated, or delaminated due to factors such as changes in building use, changes in operations and maintenance practices, changes in occupancy, or recurrent damage.

"Potential significant damage" means circumstances in which:

(1) Friable ACBM is in an area regularly used by building occupants, including maintenance personnel, in the course of their normal activities.

(2) There are indications that there is a reasonable likelihood that the material or its covering will become significantly damaged, deteriorated, or delaminated due to factors such as changes in building use, changes in operations and maintenance practices, changes in occupancy, or recurrent damage.

(3) The material is subject to major or continuing disturbance, due to factors including, but not limited to, accessibility or, under certain circumstances, vibration or air erosion.

"Preventive measures" means actions taken to reduce disturbance of ACBM or otherwise eliminate the reasonable likelihood of the material's becoming damaged or significantly damaged.

"Removal" means the taking out or the stripping of substantially all ACBM from a damaged area, a functional space, or a homogeneous area in a school building.

"Repair" means returning damaged ACBM to an undamaged condition or to an intact state so as to prevent fiber release.

"Response action" means a method, including removal, encapsulation, enclosure, repair, operations and maintenance, that protects human health and the environment from friable ACBM.

"Routine maintenance area" means an area, such as a boiler room or mechanical room, that is not normally frequented by students and in which maintenance employees or contract workers regularly conduct maintenance activities.

"School" means any elementary or secondary school as defined in section 198 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2854).

"School building" means:

(1) Any structure suitable for use as a classroom, including a school facility such as a laboratory, library, school eating facility, or facility used for the preparation of food.

(2) Any gymnasium or other facility which is specially designed for athletic or recreational activities for an academic course in physical education.

(3) Any other facility used for the instruction or housing of students or for the administration of educational or research programs.

(4) Any maintenance, storage, or utility facility, including any hallway, essential to the operation of any facility described in this definition of "school building" under paragraphs (1), (2), or (3).

(5) Any portico or covered exterior hallway or walkway.

(6) Any exterior portion of a mechanical system used to condition interior space.

"Significantly damaged friable miscellaneous ACM" means damaged friable miscellaneous ACM in a functional space where the damage is extensive and severe.

"Significantly damaged friable surfacing ACM" means damaged friable surfacing ACM in a functional space where the damage is extensive and severe.

"State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Marianas, the Trust Territory of the Pacific Islands, and the Virgin Islands.

"Surfacing ACM" means surfacing material that is ACM.

"Surfacing material" means material in a school building that is sprayed-on, troweled-on, or otherwise applied to surfaces, such as acoustical plaster on ceilings and fireproofing materials on structural members, or other materials on surfaces for acoustical, fireproofing, or other purposes.

"Thermal system insulation" means material in a school building applied to pipes, fittings, boilers, breeching tanks, ducts, or other interior structural components to prevent heat loss or gain, or water condensation, or for other purposes.

"Thermal system insulation ACM" means thermal system insulation that is ACM.

"Vibration" means the periodic motion of friable ACBM which may result in the release of asbestos fibers.

§ 763.84 General local education agency responsibilities.

Each local education agency shall:

(a) Ensure that the activities of any persons who perform inspections, reinspection, and periodic surveillance, develop and update management plans, and develop and implement response actions, including operations and maintenance, are carried out in accordance with Subpart E of this part.

(b) Ensure that all custodial and maintenance employees are properly trained as required by this Subpart E and other applicable Federal and/or State regulations (e.g., the Occupational Safety and Health Administration asbestos standard for construction, the EPA worker protection rule, or applicable State regulations).

(c) Ensure that workers and building occupants, or their legal guardians, are informed at least once each school year about inspections, response

actions, and post-response action activities, including periodic reinspection and surveillance activities that are planned or in progress.

(d) Ensure that short-term workers (e.g., telephone repair workers, utility workers, or exterminators) who may come in contact with asbestos in a school are provided information regarding the locations of ACBM and suspected ACBM assumed to be ACM.

(e) Ensure that warning labels are posted in accordance with § 763.95.

(f) Ensure that management plans are available for inspection and notification of such availability has been provided as specified in the management plan under § 763.93(g).

(g)(1) Designate a person to ensure that requirements under this section are properly implemented.

(2) Ensure that the designated person receives adequate training to perform duties assigned under this section. Such training shall provide, as necessary, basic knowledge of:

(i) Health Effects of asbestos.

(ii) Detection, identification, and assessment of ACM.

(iii) Options for controlling ACBM.

(iv) Asbestos management programs.

(v) Relevant Federal and State regulations concerning asbestos, including those in this Subpart E and those of the Occupational Safety and Health Administration, U.S. Department of Labor, the U.S. Department of Transportation and the U.S. Environmental Protection Agency.

(h) Consider whether any conflict of interest may arise from the interrelationship among accredited personnel and whether that should influence the selection of accredited personnel to perform activities under this subpart.

§ 763.85 Inspection and reinspections.

(a) Inspection.

(1) Except as provided in paragraph (a)(2) of this section, before October 12, 1988, local education agencies shall inspect each school building that they lease, own or otherwise use as a school building to identify all locations of friable and nonfriable ACBM.

(2) Any building leased or acquired on or after October 12, 1988, that is to be used as a school building shall be inspected as described under paragraphs (a) (3) and (4) of this section prior to use as a school building. In the event that emergency use of an uninspected building as a school building is necessitated, such buildings shall be inspected within 30 days after commencement of such use.

(3) Each inspection shall be made by an accredited inspector.

(4) For each area of a school building, except as excluded under § 763.99, each person performing an inspection shall:

(i) Visually inspect the area to identify the locations of all suspected ACBM.

(ii) Touch all suspected ACBM to determine whether they are friable.

(iii) Identify all homogeneous areas of friable suspected ACBM and all homogeneous areas of nonfriable suspected ACBM.

(iv) Assume that some or all of the homogeneous areas are ACM, and, for each homogeneous area that is not assumed to be ACM, collect and submit for analysis bulk samples under §§ 763.86 and 763.87.

(v) Assess, under § 763.88, friable material in areas where samples are collected, friable material in areas that are assumed to be ACBM, and friable ACBM identified during a previous inspection.

(vi) Record the following and submit to the person designated under § 763.84 a copy of such record for inclusion in the management plan within 30 days of the inspection:

(A) An inspection report with the date of the inspection signed by each accredited person making the inspection, State of accreditation, and if applicable, his or her accreditation number.

(B) An inventory of the locations of the homogeneous areas where samples are collected, exact location where each bulk sample is collected, dates that samples are collected, homogeneous areas where friable suspected ACBM is assumed to be ACM, and homogeneous areas where nonfriable suspected ACBM is assumed to be ACM.

(C) A description of the manner used to determine sampling locations, the name and signature of each accredited inspector who collected the samples, State of accreditation, and, if applicable, his or her accreditation number.

(D) A list of whether the homogeneous areas identified under paragraph (a)(4)(vi)(B) of this section are surfacing material, thermal system insulation, or miscellaneous material.

(E) Assessments made of friable material, the name and signature of each accredited inspector making the assessment, State of accreditation, and if applicable, his or her accreditation number.

(b) Reinspection.

(1) At least once every 3 years after a management plan is in effect, each local education agency shall conduct a reinspection of all friable and nonfriable known or assumed ACBM in each school building that they lease, own or otherwise use as a school building.

(2) Each inspection shall be made by an accredited inspector.

(3) For each area of a school building, each person performing a reinspection shall:

(i) Visually reinspect, and reassess, under § 763.88, the condition of all friable known or assumed ACBM.

(ii) Visually inspect material that was previously considered nonfriable ACBM and touch the material to determine whether it has become friable since the last inspection or reinspection.

(iii) Identify any homogeneous areas with material that has become friable since the last inspection or reinspection.

(iv) For each homogeneous area of newly friable material that is already assumed to be ACBM, bulk samples may be collected and submitted for analysis in accordance with §§ 763.86 and 763.87.

(v) Assess, under § 763.88, the condition of the newly friable material in areas when samples are collected, and newly friable materials in areas that are assumed to be ACBM.

(vi) Reassess, under § 763.88, the condition of friable known or assumed ACBM previously identified.

(vii) Record the following and submit to the person designated under § 763.84 a copy of such record for inclusion in the management plan within 30 days of the reinspection:

(A) The date of the reinspection, the name and signature of the person making the reinspection, State of accreditation, and if applicable, his or her accreditation number, and any changes in the condition of known or assumed ACBM.

(B) The exact locations where samples are collected during the reinspection, a description of the manner used to determine sampling locations, the name and signature of each accredited inspector who collected the samples, State of accreditation, and, if applicable, his or her accreditation number.

(C) Any assessments or reassessments made of friable material, the name and signature of the accredited inspector making the assessments, State of accreditation, and if applicable, his or her accreditation number.

(c) General. Thermal system insulation that has retained its structural integrity and that has an undamaged protective jacket or wrap that prevents fiber release shall be treated as nonfriable and therefore is subject only to periodic surveillance and preventive measures as necessary.

§ 763.86 Sampling.

(a) Surfacing material. An accredited inspector shall collect, in a statistically random manner that is representative of the homogeneous area, bulk samples

from each homogeneous area of friable surfacing material that is not assumed to be ACM, and shall collect the samples as follows:

(1) At least three bulk samples shall be collected from each homogeneous area that is 1,000 ft square or less, except as provided in § 763.87(c)(2).

(2) At least five bulk samples shall be collected from each homogeneous area that is greater than 1,000 ft square but less than or equal to 5,000 ft square, except as provided in § 763.87(c)(2).

(3) At least seven bulk samples shall be collected from each homogeneous area that is greater than 5,000 ft square, except as provided in § 763.87(c)(2).

(b) Thermal system insulation.

(1) Except as provided in paragraphs (b)(2) through (4) of this section and § 763.87(c), an accredited inspector shall collect, in a randomly distributed manner, at least three bulk samples from each homogeneous area of thermal system insulation that is not assumed to be ACM.

(2) Collect at least one bulk sample from each homogeneous area of patched thermal system insulation that is not assumed to be ACM if the patched section is less than 6 linear or square feet.

(3) In a manner sufficient to determine whether the material is ACM or not ACM, collect bulk samples from each insulated mechanical system that is not assumed to be ACM where cement or plaster is used on fittings such as tees, elbows, or valves, except as provided under § 763.87(c)(2).

(4) Bulk samples are not required to be collected from any homogeneous area where the accredited inspector has determined that the thermal

system insulation is fiberglass, foam glass, rubber, or other non-ACBM.

(c) Miscellaneous material. In a manner sufficient to determine whether material is ACM or not ACM, an accredited inspector shall collect bulk samples from each homogeneous area of friable miscellaneous material that is not assumed to be ACM.

(d) Nonfriable suspected ACBM. If any homogeneous area of nonfriable suspected ACBM is not assumed to be ACM, then an accredited inspector shall collect, in a manner sufficient to determine whether the material is ACM or not ACM, bulk samples from the homogeneous area of nonfriable suspected ACBM that is not assumed to be ACM.

§ 763.87 Analysis.

(a) Local education agencies shall have bulk samples, collected under § 763.86 and submitted for analysis, analyzed for asbestos using laboratories accredited by the National Bureau of Standards (NBS). Local education agencies shall use laboratories which have received interim accreditation for polarized light microscopy (PLM) analysis under the EPA Interim Asbestos Bulk Sample Analysis Quality Assurance Program until the NBS PLM laboratory accreditation program for PLM is operational.

(b) Bulk samples shall not be composited for analysis and shall be analyzed for asbestos content by PLM, using the "Interim Method for the Determination of Asbestos in Bulk Insulation Samples" found at Appendix A to Subpart F in 40 CFR Part 763.

(c)(1) A homogeneous area is considered not to contain ACM only if the results of all samples required to be collected from the area show asbestos in amounts of 1 percent or less.

(2) A homogeneous area shall be determined to contain ACM based on a finding that the results of at least one sample collected from that area shows that asbestos is present in an amount greater than 1 percent.

(d) The name and address of each laboratory performing an analysis, the date of analysis, and the name and signature of the person performing the analysis shall be submitted to the person designated under § 763.84 for inclusion into the management plan within 30 days of the analysis.

§ 763.88 Assessment.

(a)(1) For each inspection and reinspection conducted under § 763.85(a) and (c) and previous inspections specified under § 763.99, the local education agency shall have an accredited inspector provide a written assessment of all friable known or assumed ACBM in the school building.

(2) Each accredited inspector providing a written assessment shall sign and date the assessment, provide his or her State of accreditation, and if applicable, accreditation number, and submit a copy of the assessment to the person designated under § 763.84 for inclusion in the management plan within 30 days of the assessment.

(b) The inspector shall classify and give reasons in the written assessment for classifying the ACBM and suspected ACBM assumed to be ACM in the school building into one of the following categories:

(1) Damaged or significantly damaged thermal system insulation ACM.

(2) Damaged friable surfacing ACM.

(3) Significantly damaged friable surfacing ACM.

(4) Damaged or significantly damaged friable miscellaneous ACM.

(5) ACBM with potential for damage.

(6) ACBM with potential for significant damage.

(7) Any remaining friable ACBM or friable suspected ACBM.

(c) Assessment may include the following considerations:

(1) Location and the amount of the material, both in total quantity and as a percentage of the functional space.

(2) Condition of the material, specifying:

(i) Type of damage or significant damage (e.g., flaking, blistering, water damage, or other signs of physical damage).

(ii) Severity of damage (e.g., major flaking, severely torn jackets, as opposed to occasional flaking, minor tears to jackets).

(iii) Extent or spread of damage over large areas or large percentages of the homogeneous area.

(3) Whether the material is accessible.

(4) The material's potential for disturbance.

(5) Known or suspected causes of damage or significant damage (e.g., air erosion, vandalism, vibration, water).

(6) Preventive measures which might eliminate the reasonable likelihood of undamaged ACM from becoming significantly damaged.

(d) The local education agency shall select a person accredited to develop management plans to review the

results of each inspection, reinspection, and assessment for the school building and to conduct any other necessary activities in order to recommend in writing to the local education agency appropriate response actions. The accredited person shall sign and date the recommendation, provide his or her State of accreditation, and, if applicable, provide his or her accreditation number, and submit a copy of the recommendation to the person designated under § 763.84 for inclusion in the management plan.

§ 763.90 Response Actions.

(a) The local education agency shall select and implement in a timely manner the appropriate response actions in this section consistent with the assessment conducted in § 763.88. The response actions selected shall be sufficient to protect human health and the environment. The local education agency may then select, from the response actions which protect human health and the environment, that action which is the least burdensome method. Nothing in this section shall be construed to prohibit removal of ACBM from a school building at any time, should removal be the preferred response action of the local education agency.

(b) If damaged or significantly damaged thermal system insulation ACM is present in a building, the local education agency shall:

(1) At least repair the damaged area.

(2) Remove the damaged material if it is not feasible, due to technological factors, to repair the damage.

(3) Maintain all thermal system insulation ACM and its covering in an intact state and undamaged condition.

(c) (1) If damaged friable surfacing ACM or damaged friable miscellaneous ACM is present in a building,

the local education agency shall select from among the following response actions: encapsulation, enclosure, removal, or repair of the damaged material.

(2) In selecting the response action from among those which meet the definitional standards in § 763.83, the local education agency shall determine which of these response actions protects human health and the environment. For purposes of determining which of these response actions are the least burdensome, the local education agency may then consider local circumstances, including occupancy and use patterns within the school building, and its economic concerns, including short-and long-term costs.

(d) If significantly damaged friable surfacing ACM or significantly damaged friable miscellaneous ACM is present in a building the local education agency shall:

(1) Immediately isolate the functional space and restrict access, unless isolation is not necessary to protect human health and the environment.

(2) Remove the material in the functional space or, depending upon whether enclosure or encapsulation would be sufficient to protect human health and the environment, enclose or encapsulate.

(e) If any friable surfacing ACM, thermal system insulation ACM, or friable miscellaneous ACM that has potential for damage is present in a building, the local education agency shall at least implement an operations and maintenance (O&M) program, as described under § 763.91.

(f) If any friable surfacing ACM, thermal system insulation ACM, or friable miscellaneous ACM that has potential for significant damage is present in a building, the local education agency shall:

(1) Implement an O&M program, as described under § 763.91.

(2) Institute preventive measures appropriate to eliminate the reasonable likelihood that the ACM or its covering will become significantly damaged, deteriorated, or delaminated.

(3) Remove the material as soon as possible if appropriate preventive measures cannot be effectively implemented, or unless other response actions are determined to protect human health and the environment. Immediately isolate the area and restrict access if necessary to avoid an imminent and substantial endangerment to human health or the environment.

(g) Response actions including removal, encapsulation, enclosure, or repair, other than small-scale, short-duration repairs, shall be designed and conducted by persons accredited to design and conduct response actions.

(h) The requirements of this Subpart E in no way supersede the worker protection and work practice requirements under 29 CFR 1926.58 (Occupational Safety and Health Administration (OSHA) asbestos worker protection standards for construction), 40 CFR Part 763, Subpart G (EPA asbestos worker protection standards for public employees), and 40 CFR Part 61, Subpart M (National Emission Standards for Hazardous Air Pollutants — Asbestos).

(i) Completion of response actions.

(1) At the conclusion of any action to remove, encapsulate, or enclose ACBM or material assumed to be ACBM, a person designated by the local education agency shall visually inspect each functional space where such action was conducted to determine whether the action has been properly completed.

(2)(i) A person designated by the local education agency shall collect air samples using aggressive sampling as described in Appendix A to this Subpart E to monitor air for clearance after each removal, encapsulation, and enclosure projects involving ACBM, except for projects that are of small-scale, short-duration.

(ii) Local education agencies shall have air samples collected under this section analyzed for asbestos using laboratories accredited by the National Bureau of Standards to conduct such analysis using transmission electron microscopy (TEM) or, under circumstances permitted in this section, laboratories enrolled in the American Industrial Hygiene Association Proficiency Analytical Testing Program for phase contrast microscopy (PCM).

(iii) Until the National Bureau of Standards TEM laboratory accreditation program is operational, local educational agencies shall use laboratories that use the protocol described in Appendix A to Subpart E of this part.

(3) Except as provided in paragraphs (i)(4),(5), (6) or (7) of this section, an action to remove, encapsulate, or enclose ACBM shall be considered complete when the average concentration of asbestos of five air samples collected within the affected functional space and analyzed by the TEM method in Appendix A of this Subpart E, is not statistically significantly different, as determined by the Z-test calculation found in Appendix A of this Subpart E, from the average asbestos concentration of five air samples collected at the same time outside the affected functional space and analyzed in the same manner, and the average asbestos concentration of the three field blanks described in Appendix A of this Subpart E is below the filter background level,

as defined in Appendix A of this Subpart E, of 70 structures per square millimeter (70 s/mm square).

(4) An action may also be considered complete if the volume of air drawn for each of the five samples collected within the affected functional space is equal to or greater than 1,199 L of air for a 25 mm filter or equal to or greater than 2,799 L of air for a 37 mm filter, and the average concentration of asbestos as analyzed by the TEM method in Appendix A of this Subpart E, for the five air samples does not exceed the filter background level, as defined in Appendix A, of 70 structures per square millimeter (70 s/mm square). If the average concentration of asbestos of the five air samples within the affected functional space exceeds 70 s/mm2, or if the volume of air in each of the samples is less than 1,199 L of air for a 25 mm filter or less than 2,799 L of air for a 37 mm filter, the action shall be considered complete only when the requirements of paragraph (i)(3), (5), (6), or (7) of this section are met.

(5) At any time, a local education agency may analyze air monitoring samples collected for clearance purposes by phase contrast microscopy (PCM) to confirm completion of removal, encapsulation, or enclosure of ACBM that is greater than small-scale, short-duration and less than or equal to 160 square feet or 260 linear feet. The action shall be considered complete when the results of samples collected in the affected functional space and analyzed by phase contrast microscopy using the National Institute for Occupational Safety and Health (NIOSH) Method 7400 entitled "Fibers" published in the NIOSH Manual of Analytical Methods, 3rd Edition, Second Supplement, August 1987, show that the concentration of fibers for each of the five samples is less than or equal to a limit of quantitation for PCM (0.01 fibers per cubic centimeter (0.01 f/cm cube) of

air). The method is available at the Office of the Federal Register Information Center, 11th and L St., N.W., Room 8401, Washington, D.C., 20408, and the EPA OPTS Reading Room, Rm. G004 Northeast Mall, 401 M St., S.W., Washington, D.C. 20460. This incorporation by reference was improved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. The method is incorporated as it exists on the effective date of this rule, and a notice of any change to the method will be published in the *Federal Register*.

(6) Until October 7, 1989, a local education agency may analyze air monitoring samples collected for clearance purposes by PCM to confirm completion of removal, encapsulation, or enclosure of ACBM that is less than or equal to 3,000 square feet or 1,000 linear feet. The action shall be considered complete when the results of samples collected in the affected functional space and analyzed by PCM using the NIOSH Method 7400 entitled "Fibers" published in the NIOSH Manual of Analytical Methods, 3d Edition, Second Supplement, August 1987, show that the concentration of fibers for each of the five samples is less than or equal to a limit quantitation for PCM (0.01 fibers per cubic centimeter, 0.01 f/cm cube). The method is available at the Office of the Federal Register, 11th and L St., N.W., Room 8301, Washington, D.C. 20408, and in the EPA OPTS Reading Room, Rm. G004 Northeast Mall, 401 M St., SW., Washington, DC 20460. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. The method is incorporated as it exists on the effective date of this rule and a notice of any change to the method will be published in the *Federal Register*.

(7) From October 8, 1989, to October 7, 1990, a local education agency may analyze air monitoring samples collected for clearance purposes by PCM to confirm completion of removal, encapsulation, or enclosure of ACBM that is less than or equal to 1,500 square feet or 500 linear feet. The action shall be considered complete when the results of samples collected in the affected functional space and analyzed by PCM using the NIOSH Method 7400 entitled "Fibers" published in the NIOSH Manual of Analytical Methods, 3rd Edition, Second Supplement, August 1987, show that the concentration of fibers for each of the five samples is less than or equal to a limit of quantitation for PCM (0.01 fibers per cubic centimeter 0.01 f/cm cube). The method is available at the Office of the Federal Register, 11th and L St., N.W., Room 8301, Washington, D.C. 20408, and in the EPA OPTS Reading Room, Rm. G004 Northeast Mall, 401 M St., S.W., Washington, D.C 20460. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. The method is incorporated as it exists on the effective date of this rule and a notice of any change to the method will be published in the *Federal Register*.

(8) To determine the amount of ACBM affected under paragraphs (i)(5),(6), and (7) of this section, the local education agency shall add the total square or linear footage of ACBM within the containment barriers used to isolate the functional space for the action to remove, encapsulate, or enclose the ACBM. Contiguous portions of material subject to such action conducted concurrently or at approximately the same time within the same school building shall not be separated to qualify under paragraphs (i)(5),(6), or (7) of this section.

§ 763.91 Operations and maintenance.

(a) Applicability. The local education agency shall implement an operations, maintenance, and repair (O&M) program under this section whenever any friable ACBM is present or assumed to be present in a building that it leases, owns, or otherwise uses as a school building. Any material identified as nonfriable ACBM or nonfriable assumed ACBM must be treated as friable ACBM for purposes of this section when the material is about to become friable as a result of activities performed in the school building.

(b) Worker protection. The protection provided by EPA at 40 CFR 763.121 for worker protection during asbestos abatement projects is extended to employees of local education agencies who perform operations, maintenance, and repair (O&M) activities involving ACM and who are not covered by the OSHA asbestos construction standard at 29 CFR 1926.58 or an asbestos worker approved by OSHA under section 19 of the Occupational Safety and Health Act. Local education agencies may consult Appendix B of this Subpart if their employees are performing operations, maintenance, and repair activities that are of small-scale, short-duration.

(c) Cleaning.

(1) Initial cleaning. Unless the building has been cleaned using equivalent methods within the previous 6 months, all areas of a school building where friable ACBM, damaged or significantly damaged thermal system insulation ACM, or friable suspected ACBM assumed to be ACM are present shall be cleaned at least once after the completion of the inspection required by § 763.85(a) and before the initiation of any response action, other than O&M activities or repair, according to the following procedures:

(i) HEPA-vacuum or steam-clean all carpets.

(ii) HEPA-vacuum or wet-clean all other floors and all other horizontal surfaces.

(iii) Dispose of all debris, filters, mopheads, and cloths in sealed, leak-tight containers.

(2) Additional cleaning. The accredited management planner shall make a written recommendation to the local education agency whether additional cleaning is needed, and if so, the methods and frequency of such cleaning.

(d) Operations and maintenance activities. The local education agency shall ensure that the procedures described below to protect building occupants shall be followed for any operations and maintenance activities disturbing friable ACBM:

(1) Restrict entry into the area by persons other than those necessary to perform the maintenance project, either by physically isolating the area or by scheduling.

(2) Post signs to prevent entry by unauthorized persons.

(3) Shut off or temporarily modify the airhandling system and restrict other sources of air movement.

(4) Use work practices or other controls, such as, wet methods, protective clothing, HEPA-vacuums, minienclosures, glove bags, as necessary to inhibit the spread of any released fibers.

(5) Clean all fixtures or other components in the immediate work area.

(6) Place the asbestos debris and other cleaning materials in a sealed, leak-tight container.

(e) Maintenance activities other than small-scale, short-duration. The response action for any maintenance activities disturbing friable ACBM, other than small-scale, short-duration maintenance activities, shall be designed by persons accredited to design response actions and conducted by persons accredited to conduct response actions.

(f) Fiber release episodes —

(1) Minor fiber release episode. The local education agency shall ensure that the procedures described below are followed in the event of a minor fiber release episode (i.e., the falling or dislodging of 3 square or linear feet or less of friable ACBM):

(i) Thoroughly saturate the debris using wet methods.

(ii) Clean the area, as described in paragraph (e) of this section.

(iii) Place the asbestos debris in a sealed, leak-tight container.

(iv) Repair the area of damaged ACM with materials such as asbestos-free spackling, plaster, cement, or insulation, or seal with latex paint or an encapsulant, or immediately have the appropriate response action implemented as required by § 763.90.

(2) Major fiber release episode. The local education agency shall ensure that the procedures described below are followed in the event of a major fiber release episode (i.e., the falling or dislodging of more than 3 square or linear feet of friable ACBM):

(i) Restrict entry into the area and post signs to prevent entry into the area by persons other than those necessary to perform the response action.

(ii) Shut off or temporarily modify the air-handling system to prevent the distribution of fibers to other areas in the building.

(iii) The response action for any major fiber release episode must be designed by persons accredited to design response actions and conducted by persons accredited to conduct response actions.

§ 763.92 Training and periodic surveillance —

(a) Training.

(1) The local education agency shall ensure, prior to the implementation of the O&M provisions of the management plan, that all members of its maintenance and custodial staff (custodians, electricians, heating/air conditioning engineers, plumbers, etc.) who may work in a building that contains ACBM receive awareness training of at least 2 hours, whether or not they are required to work with ACBM. New custodial and maintenance employees shall be trained within 60 days after commencement of employment. Training shall include, but not be limited to:

(i) Information regarding asbestos and its various uses and forms.

(ii) Information on the health effects associated with asbestos exposure.

(iii) Locations of ACBM identified throughout each school building in which they work.

(iv) Recognition of damage, deterioration, and delamination of ACBM.

(v) Name and telephone number of the person designated to carry out general local education agency responsibilities under § 763.84 and the availability and location of the management plan.

(2) The local education agency shall ensure that all members of its maintenance and custodial staff who conduct any activities that will result in the disturbance of ACBM shall receive training described in paragraph (a)(1) of this section and 14 hours of additional training. Additional training shall include, but not be limited to:

(i) Descriptions of the proper methods of handling ACBM.

(ii) Information on the use of respiratory protection as contained in the EPA/NIOSH *Guide to Respiratory Protection for the Asbestos Abatement Industry,* September 1986 (EPA 560/OPTS-86-001), available from TSCA Assistance Office (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. E-543, 401 M St. S.W., Washington, DC 20460, and other personal protection measures.

(iii) The provisions of this section and § 763.91, Appendices A, B, C, D of this Subpart E of this part, EPA regulations contained in 40 CFR Part 763, Subpart G, and in 40 CFR Part 61, Subpart M, and OSHA regulations contained in 29 CFR 1926.58.

(iv) Hands-on training in the use of respiratory protection, other personal protection measures, and good work practices.

(3) Local education agency maintenance and custodial staff who have attended EPA-approved asbestos training or received equivalent training for O&M and periodic surveillance activities involving asbestos shall be considered trained for the purposes of this section.

(b) Periodic surveillance.

(1) At least once every 6 months after a management plan is in effect, each local education agency shall conduct periodic surveillance in each building that it leases, owns, or otherwise uses as a school building that contains ACBM or is assumed to contain ACBM.

(2) Each person performing periodic surveillance shall:

(i) Visually inspect all areas that are identified in the management plan as ACBM or assumed ACBM.

(ii) Record the date of the surveillance, his or her name, and any changes in the condition of the materials.

(iii) Submit to the person designated to carry out general local education agency responsibilities under § 763.84 a copy of such record for inclusion in the management plan.

§ 763.93 Management plans.

(a) (1) On or before October 12, 1988, each local education agency shall develop an asbestos management plan for each school, including all buildings that they lease, own, or otherwise use as school buildings, and submit the plan to an Agency designated by the Governor of the State in which the local education agency is located. The plan may be submitted in stages that cover a portion of the school buildings under the authority of the local education agency.

(2) If a building to be used as part of a school is leased or otherwise acquired after October 12, 1988, the local education agency shall include the new building in the management plan for the school prior to its use as a school building. The revised

portions of the management plan shall be submitted to the Agency designated by the Governor.

(3) If a local education agency begins to use a building as a school after October 12, 1988, the local education agency shall submit a management plan for the school to the Agency designated by the Governor prior to its use as a school.

(b) On or before October 17, 1987, the Governor of each State shall notify local education agencies in the State regarding where to submit their management plans. States may establish administrative procedures for reviewing management plans. If the Governor does not disapprove a management plan within 90 days after receipt of the plan, the local education agency shall implement the plan.

(c) Each local education agency must begin implementation of its management plan on or before July 9, 1989, and complete implementation in a timely fashion.

(d) Each local education agency shall maintain and update its management plan to keep it current with ongoing operations and maintenance, periodic surveillance, inspection, reinspection, and response action activities. All provisions required to be included in the management plan under this section shall be retained as part of the management plan, as well as any information that has been revised to bring the plan up-to-date.

(e) The management plan shall be developed by an accredited management planner and shall include:

(1) A list of the name and address of each school building and whether the school building contains friable ACBM, nonfriable ACBM, and friable and nonfriable suspected ACBM assumed to be ACM.

(2) For each inspection conducted before December 14, 1987:

(i) The date of the inspection.

(ii) A blueprint, diagram, or written description of each school building that identifies clearly each location and approximate square or linear footage of any homogeneous or sampling area where material was sampled for ACM, and, if possible, the exact locations where bulk samples were collected, and the dates of collection.

(iii) A copy of the analyses of any bulk samples, dates of analyses, and a copy of any other laboratory reports pertaining to the analyses.

(iv) A description of any response actions or preventive measures taken to reduce asbestos exposure, including if possible, the names and addresses of all contractors involved, start and completion dates of the work, and results of any air samples analyzed during and upon completion of the work.

(v) A description of assessments, required to be made under § 763.88, of material that was identified before December 14, 1987, as friable ACBM or friable suspected ACBM assumed to be ACM, and the name and signature, State of accreditation, and if applicable, accreditation number of each accredited person making the assessments.

(3) For each inspection and reinspection conducted under § 763.85:

(i) The date of the inspection or reinspection and the name and signature, State of accreditation, and if applicable, the accreditation number of each accredited inspector performing the inspection or reinspection.

(ii) A blueprint, diagram, or written description of each school building that identifies clearly each location and approximate square or linear footage of homogeneous areas where material was sampled for ACM, the exact location where each

bulk sample was collected, date of collection, homogeneous areas where friable suspected ACBM is assumed to be ACM, and where nonfriable suspected ACBM is assumed to be ACM.

(iii) A description of the manner used to determine sampling locations, and the name and signature of each accredited inspector collecting samples, the State of accreditation, and if applicable, his or her accreditation number.

(iv) A copy of the analyses of any bulk samples collected and analyzed, the name and address of any laboratory that analyzed bulk samples, a statement that the laboratory meets the applicable requirements of § 763.87(a), the date of the analysis, and the name and signature of the person performing the analysis.

(v) A description of assessments, required to be made under § 763.88, of all ACBM and suspected ACBM assumed to be ACM, and the name, signature, State of accreditation, and if applicable, accreditation number of each accredited person making the assessments.

(4) The name, address, and telephone number of the person designated under § 763.84 to ensure that the duties of the local education agency are carried out, and the course name, and dates and hours of training taken by that person to carry out the duties.

(5) The recommendations made to the local education agency regarding response actions, under § 763.88(d), the name, signature, State of accreditation of each person making the recommendations, and if applicable, his or her accreditation number.

(6) A detailed description of preventive measures and response actions to be taken, including

methods to be used, for any friable ACBM, the locations where such measures and action will be taken, reasons for selecting the response action or preventive measure, and a schedule for beginning and completing each preventive measure and response action.

(7) With respect to the person or persons who inspected for ACBM and who will design or carry out response actions, except for operations and maintenance, with respect to the ACBM, one of the following statements:

(i) If the State has adopted a contractor accreditation program under section 206(b) of Title II of the Act, a statement that the person(s) is accredited under such plan.

(ii) A statement that the local education agency used (or will use) persons who have been accredited by another State which has adopted a contractor accreditation plan under section 206(b) of Title II of the Act or is accredited by an EPA-approved course under section 206(c) of Title II of the Act.

(8) A detailed description in the form of a blueprint, diagram, or in writing of any ACBM or suspected ACBM assumed to be ACM which remains in the school once response actions are undertaken pursuant to § 763.90. This description shall be updated as response actions are completed.

(9) A plan for reinspection under § 763.85, a plan for operations and maintenance activities under § 763.91, and a plan for periodic surveillance under § 763.92, a description of the recommendation made by the management planner regarding additional cleaning under § 763.91(c)(2) as part of an operations and maintenance program, and the

response of the local education agency to that recommendation.

(10) A description of steps taken to inform workers and building occupants, or their legal guardians, about inspections, reinspections, response action, and postresponse action activities, including periodic reinspection and surveillance activities that are planned or in progress.

(11) An evaluation of the resources needed to complete response actions successfully and carry out reinspection operations and maintenance activities, periodic surveillance and training.

(12) With respect to each consultant who contributed to the management plan, the name of the consultant and one of the following statements:

(i) If the State has adopted a contractor accreditation plan under section 206(b) of Title II of the Act, a statement that the consultant is accredited under such plan.

(ii) A statement that the contractor is accredited by another State which has adopted a contractor accreditation plan under section 206(b) of Title II of the Act, or is accredited by an EPA-approved course developed under section 206(c) of Title II of the Act.

(f) A local education agency may require each management plan to contain a statement signed by an accredited management plan developer that such person has prepared or assisted in the preparation of such plan or had reviewed such plan, and that such plan is in compliance with this Subpart E. Such statement may not be signed by a person who, in addition to preparing or assisting in preparing the management plan, also implements (or will implement) the management plan.

(g) (1) Upon submission of a management plan to the Governor for review, a local education agency

shall keep a copy of the plan in its administrative office. The management plans shall be available, without cost or restriction, for inspection by representatives of EPA and the State, the public, including teachers, other school personnel and their representatives, and parents. The local education agency may charge a reasonable cost to make copies of management plans.

(2) Each local education agency shall maintain in its administrative office a complete, updated copy of a management plan for each school under its administrative control or direction. The management plans shall be available, during normal business hours, without cost or restriction, for inspection by representatives of EPA and the State, the public, including teachers, other school personnel and their representatives, and parents. The local education agency may charge a reasonable cost to make copies of management plans.

(3) Each school shall maintain in its administrative office a complete, updated copy of the management plan for that school. Management plans shall be available for inspection, without cost or restriction, to workers before work begins in any area of a school building. The school shall make management plans available for inspection to representatives of EPA and the State, the public, including parents, teachers, and other school personnel and their representatives within 5 working days after receiving a request for inspection. The school may charge a reasonable cost to make copies of the management plan.

(4) Upon submission of its management plan to the Governor and at least once each school year, the local education agency shall notify in writing parent,

teacher, and employee organizations of the availability of management plans and shall include in the management plan a description of the steps taken to notify such organizations, and a dated copy of the notification. In the absence of any such organization for parents, teachers, or employees, the local education agency shall provide written notice to that relevant group of the availability of management plans and shall include in the management plan a description of the steps taken to notify such groups, and a dated copy of the notification.

(h) Records required under § 763.94 shall be made by local education agencies and maintained as part of the management plan.

(i) Each management plan must contain a true and correct statement, signed by the individual designated by the local education agency under § 763.84, which certifies that the general, local education agency responsibilities, as stipulated by § 763.84 have been met or will be met.

§ 763.94 Recordkeeping.

(a) Records required under this section shall be maintained in a centralized location in the administrative office of both the school and the local education agency as part of the management plan. For each homogeneous area where all ACBM has been removed, the local education agency shall ensure that such records are retained for 3 years after the next reinspection required under § 763.85(b)(1), or for an equivalent period.

(b) For each preventive measure and response action taken for friable and nonfriable ACBM and friable and nonfriable suspected ACBM assumed to be ACM, the local education agency shall provide:

(1) A detailed written description of the measure or action, including methods used, the location

where the measure or action was taken, reasons for selecting the measure or action, start and completion dates of the work, names and addresses of all contractors involved, and if applicable, their State of accreditation, and accreditation numbers, and if ACBM is removed, the name and location of storage or disposal site of the ACM.

(2) The name and signature of any person collecting any air sample required to be collected at the completion of certain response actions specified by § 763.90(i), the locations where samples were collected, date of collection, the name and address of the laboratory analyzing the samples, the date of analysis, the results of the analysis, the method of analysis, the name and signature of the person performing the analysis, and a statement that the laboratory meets the applicable requirements of § 763.90(i)(2)(ii).

(c) For each person required to be trained under § 763.92(a)(1) and (2), the local education agency shall provide the person's name and job title, the date that training was completed by that person, the location of the training, and the number of hours completed in such training.

(d) For each time that periodic surveillance under § 763.92(b) is performed, the local education agency shall record the name of each person performing the surveillance, the date of the surveillance, and any changes in the conditions of the materials.

(e) For each time that cleaning under § 763.91(c) is performed, the local education agency shall record the name of each person performing the cleaning, the date of such cleaning, the locations cleaned, and the methods used to perform such cleaning.

(f) For each time that operations and maintenance activities under § 763.91(d) are performed, the local education agency shall record the name of each person

performing the activity, the start and completion dates of the activity, the locations where such activity occurred, a description of the activity including preventive measures used, and if ACBM is removed, the name and location of storage or disposal site of ACM.

(g) For each time that major asbestos activity under § 763.91(e) is performed, the local education agency shall provide the name and signature, State of accreditation, and if applicable, the accreditation number of each person performing the activity, the start and completion dates of the activity, the locations where such activity occurred, a description of the activity including preventive measures used, and if ACBM is removed, the name and location of storage or disposal site of ACM.

(h) For each fiber release episode under § 763.91(f), the local education agency shall provide the date and location of the episode, the method of repair, preventive measures or response action taken, the name of each person performing the work, and if ACBM is removed, the name and location of storage or disposal site of the ACM.

[Approved by the Office of Management and Budget under control number 2070-0091]

§ 763.95 Warning labels.

(a) The local education agency shall attach a warning label immediately adjacent to any friable and nonfriable ACBM and suspected ACBM assumed to be ACM located in routine maintenance areas (such as boiler rooms) at each school building. This shall include:

(1) Friable ACBM that was responded to by a means other than removal.

(2) ACBM for which no response action was carried out.

(b) All labels shall be prominently displayed in readily visible locations and shall remain posted until the ACBM that is labeled is removed.

(c) The warning label shall read, in print which is readily visible because of large size or bright color, as follows: CAUTION: ASBESTOS. HAZARDOUS. DO NOT DISTURB WITHOUT PROPER TRAINING AND EQUIPMENT.

§ 763.97 Compliance and enforcement.

(a) Compliance with Title II of the Act.

(1) Section 207(a) of Title II of the Act (15 U.S.C. 2647) makes it unlawful for any local education agency to:

(i) Fail to conduct inspections pursuant to section 203(b) of Title II of the Act, including failure to follow procedures and failure to use accredited personnel and laboratories.

(ii) Knowingly submit false information to the Governor regarding any inspection pursuant to regulations under section 203(i) of Title II of the Act.

(iii) Fail to develop a management plan pursuant to regulations under section 203(i) of Title II of the Act.

(2) Section 207(a) of Title II of the Act (15 U.S.C. 2647) also provides that any local education agency which violates any provision of section 207 shall be liable for a civil penalty of not more than $5,000 for each day during which the violation continues. For the purposes of this subpart, a "violation" means a failure to comply with respect to a single school building.

(b) Compliance with Title I of the Act.

(1) Section 15(1)(D) of Title I of the Act (15 U.S.C. 2614) makes it unlawful for any person to fail or refuse to comply with any requirement of Title II or any rule promulgated or order issued under Title II. Therefore, any person who violates any requirement of this Subpart is in violation of section 15 of Title I of the Act.

(2) Section 15(3) of Title I of the Act (15 U.S.C. 2614) makes it unlawful for any person to fail or refuse to establish or maintain records, submit reports, notices or other information, or permit access to or copying of records, as required by this Act or a rule thereunder.

(3) Section 15(4) (15 U.S.C. 2614) of Title I of the Act makes it unlawful for any person to fail or refuse to permit entry or inspection as required by section 11 of Title I of the Act.

(4) Section 16(a) of Title I of the Act (15 U.S.C. 2615) provides that any person who violates any provision of section 15 of Title I of the Act shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this paragraph, constitute a separate violation of section 15. A local education agency is not liable for any civil penalty under Title I of the Act for failing or refusing to comply with any rule promulgated or order issued under Title II of the Act.

(c) Criminal penalties. If any violation committed by any person (including a local education agency) is knowing or willful, criminal penalties may be assessed under section 16(b) of Title I of the Act.

(d) Injunctive relief. The Agency may obtain injunctive relief under section 208(b) of Title II of

the Act to respond to a hazard which poses an imminent and substantial endangerment to human health or the environment or section 17 (15 U.S.C. 2616) of Title I of the Act to restrain any violation of section 15 of Title I of the Act or to compel the taking of any action required by or under Title I of the Act.

(e) Citizen complaints. Any citizen who wishes to file a complaint pursuant to section 207(d) of Title II of the Act should direct the complaint to the Governor of the State or the EPA Asbestos Ombudsman, 401 M Street, S.W., Washington, DC 20460. The citizen complaint should be in writing and identified as a citizen complaint pursuant to section 207(d) of Title II of TSCA. The EPA Asbestos Ombudsman or the Governor shall investigate and respond to the complaint within a reasonable period of time if the allegations provide a reasonable basis to believe that a violation of the Act has occurred.

(f) Inspections. EPA may conduct inspections and review management plans under section 11 of Title I of the Act (15 U.S.C. 2610) to ensure compliance.

§ 763.98 Waiver, delegation to State.

(a) General.

(1) Upon request from a State Governor and after notice and comment and an opportunity for a public hearing in accordance with paragraphs (b) and (c) of this section, EPA may waive some or all of the requirements of this Subpart E if the State has established and is implementing or intends to implement a program of asbestos inspection and management that contains requirements that are at least as stringent as the requirements of this Subpart E.

(2) A waiver from any requirement of this Subpart E shall apply only to the specific provision for which a waiver has been granted under this section. All requirements of this Subpart E shall apply until a waiver is granted under this section.

(b) Request. Each request by a Governor to waive any requirement of this Subpart E shall be sent with three complete copies of the request to the Regional Administrator for the EPA Region in which the State is located and shall include:

(1) A copy of the State provisions or proposed provisions relating to its program of asbestos inspection and management in schools for which the request is made.

(2) (i) The name of the State agency that is or will be responsible for administering the enforcing the requirements for which a waiver is requested, the names and job titles of responsible officials in that agency, and phone numbers where the officials can be contacted.

(ii) In the event that more than one agency is or will be responsible for administering and enforcing the requirements for which a waiver is requested, a description of the functions to be performed by each agency, how the program will be coordinated by the lead agency to ensure consistency and effective administration in the asbestos inspection and management program within the State, the names and job titles of responsible officials in the agencies, and phone numbers where the offices can be contacted. The lead agency will serve as the central contact point for the EPA.

(3) Detailed reasons, supporting papers, and the rationale for concluding that the State's asbestos inspection and management program provisions for

which the request is made are at least as stringent as the requirements of this Subpart E.

(4) A discussion of any special situations, problems, and needs pertaining to the waiver request accompanied by an explanation of how the State intends to handle them.

(5) A statement of the resources that the State intends to devote to the administration and enforcement of the provisions relating to the waiver request.

(6) Copies of any specific or enabling State laws (enacted and pending enactment) and regulations (promulgated and pending promulgation) relating to the request, including provisions for assessing criminal and/or civil penalties.

(7) Assurance from the Governor, the Attorney General, or the legal counsel of the lead agency that the lead agency or other cooperating agencies have the legal authority necessary to carry out the requirements relating to the request.

(c) General notice—hearing.

(1) Within 30 days after receipt of a request for a waiver, EPA will determine the completeness of the request. If EPA does not request further information within the 30-day period, the request will be deemed complete.

(2) Within 30 days after EPA determines that a request is complete, EPA will issue for publication in the *Federal Register* a notice that announces receipt of the request, describes the information submitted under paragraph (b) of this section, and solicits written comment from interested members of the public. Comments must be submitted within 60 days.

(3) If, during the comment period, EPA receives a written objection to a Governor's request and a request for a public hearing detailing specific objections to the granting of a waiver, EPA will schedule a public hearing to be held in the affected State after the close of the comment period and will announce the public hearing date in the Federal Register before the date of the hearing. Each comment shall include the name and address of the person submitting the comment.

(d) Criteria. EPA may waive some or all of the requirements of Subpart E of this part if:

(1) The State's lead agency and other cooperating agencies have the legal authority necessary to carry out the provisions of asbestos inspection and management in schools relating to the waiver request.

(2) The State's program of asbestos inspection and management in schools relating to the waiver request and implementation of the program are or will be at least as stringent as the requirements of this Subpart E.

(3) The State has an enforcement mechanism to allow it to implement the program described in the waiver request.

(4) The lead agency and any cooperating agencies have or will have qualified personnel to carry out the provisions relating to the waiver request.

(5) The State will devote adequate resources to the administration and enforcement of the asbestos inspection and management provisions relating to the waiver request.

(6) When specified by EPA, the State gives satisfactory assurances that necessary steps, including specific actions it proposes to take and a time

schedule for their accomplishment, will be taken within a reasonable time to conform with applicable criteria under paragraph (d)(2) through (4) of this section.

(e) Decision. EPA will issue for publication in the *Federal Register* a notice announcing its decision to grant or deny, in whole or in part, a Governor's request for a waiver from some or all of the requirements of this Subpart E within 30 days after the close of the comment period or within 30 days following a public hearing, whichever is applicable. The notice will include the Agency's reasons and rationale for granting or denying the Governor's request. The 30-day period may be extended if mutually agreed upon by EPA and the State.

(f) Modifications. When any substantial change is made in the administration or enforcement of a State program for which a waiver was granted under this section, a responsible official in the lead agency shall submit such changes to EPA.

(g) Reports. The lead agency in each State that has been granted a waiver by EPA from any requirement of Subpart E of this part shall submit a report to the Regional Administrator for the Region in which the State is located at last once every 12 months to include the following information:

(1) A summary of the State's implementation and enforcement activities during the last reporting period relating to provisions waived under this section, including enforcement actions taken.

(2) Any changes in the administration or enforcement of the State program implemented during the last reporting period.

(3) Other reports as may be required by EPA to carry out effective oversight of any requirement of this Subpart E that was waived under this section.

(h) Oversight. EPA may periodically evaluate the adequacy of a State's implementation and enforcement of and resources devoted to carrying out requirements relating to the waiver. This evaluation may include, but is not limited to, site visits to local education agencies without prior notice to the State.

(i) Informal conference.

(1) EPA may request that an informal conference be held between appropriate State and EPA officials when EPA has reason to believe that a State has failed to:

(i) Substantially comply with the terms of any provision that was waived under this section.

(ii) Meet the criteria under paragraph (d) of this section, including the failure to carry out enforcement activities or act on violations of the State program.

(2) EPA will:

(i) Specify to the State those aspects of the State's program believed to be inadequate.

(ii) Specify to the State the facts that underlie the belief of inadequacy.

(3) If EPA finds, on the basis of information submitted by the State at the conference, that deficiencies did not exist or were corrected by the State, no further action is required.

(4) Where EPA finds that deficiencies in the State program exist, a plan to correct the deficiencies shall be negotiated between the State and EPA. The plan shall detail the deficiencies found in the State program, specify the steps the State has taken or will take to remedy the deficiencies, and establish a schedule for each remedial action to be initiated.

(j) Rescission.

(1) If the State fails to meet with EPA or fails to correct deficiencies raised at the informal conference, EPA will deliver to the Governor of the State and a responsible official in the lead agency a written notice of its intent to rescind, in whole or in part, the waiver.

(2) EPA will issue for publication in the *Federal Register* a notice that announces the rescission of the waiver, describes those aspects of the State's program determined to be inadequate, and specifies the facts that underlie the findings of inadequacy.

§ 763.99 Exclusions.

(a) A local education agency shall not be required to perform an inspection under § 763.85(a) in any sampling area as defined in 40 CFR 763.103 or homogeneous area of a school building where:

(1) an accredited inspector has determined that, based on sampling records, friable ACBM was identified in that homogeneous or sampling area during an inspection conducted before December 14, 1987. The inspector shall sign and date a statement to that effect with his or her State of accreditation and if applicable, accreditation number and, within 30 days after such determination, submit a copy of the statement to the person designated under § 763.84 for inclusion in the management plan. However, an accredited inspector shall assess the friable ACBM under § 763.88.

(2) An accredited inspector has determined that, based on sampling records, nonfriable ACBM was identified in that homogeneous or sampling area during an inspection conducted before December 14, 1987. The inspector shall sign and date a statement to that effect with his or her State of

accreditation and if applicable, accreditation number and, within 30 days after such determination, submit a copy of the statement to the person designated under § 763.84 for inclusion in the management plan. However, an accredited inspector shall identify whether material that was nonfriable has become friable since that previous inspection and shall assess the newly-friable ACBM under § 763.88.

(3) Based on sampling records and inspection records, an accredited inspector has determined that no ACBM is present in the homogeneous or sampling area and the records show that the area was sampled, before December 14, 1987 in substantial compliance with § 763.85(a), which for purposes of this section means in a random manner and with a sufficient number of samples to reasonably ensure that the area is not ACBM.

(i) The accredited inspector shall sign and date a statement, with his or her State of accreditation and if applicable, accreditation number that the homogeneous or sampling area determined not to be ACBM was sampled in substantial compliance with § 763.85(a).

(ii) Within 30 days after the inspector's determination, the local education agency shall submit a copy of the inspector's statement to the EPA Regional Office and shall include the statement in the management plan for that school.

(4) The lead agency responsible for asbestos inspection in a State that has been granted a waiver from § 763.85(a) has determined that, based on sampling records and inspection records, no ACBM is present in the homogeneous or sampling area and the records show that the area was sampled before December 14, 1987, in substantial compliance with

§ 763.85(a). Such determination shall be included in the management plan for that school.

(5) An accredited inspector has determined that, based on records of an inspection conducted before December 14, 1987, suspected ACBM identified in that homogeneous or sampling area is assumed to be ACM. The inspector shall sign and date a statement to that effect, with his or her State of accreditation and if applicable, accreditation number and, within 30 days of such determination, submit a copy of the statement to the person designated under § 763.84 for inclusion in the management plan. However, an accredited inspector shall identify whether material that was nonfriable suspected ACBM assumed to be ACM has become friable since the previous inspection and shall assess the newly friable material and previously identified friable suspected ACBM assumed to be ACM under § 763.88.

(6) Based on inspection records and contractor and clearance records, an accredited inspector has determined that no ACBM is present in the homogeneous or sampling area where asbestos removal operations have been conducted before December 14, 1987, and shall sign and date a statement to that effect and include his or her State of accreditation and, if applicable, accreditation number. The local education agency shall submit a copy of the statement to the EPA Regional Office and shall include the statement in the management plan for that school.

(7) An architect or project engineer responsible for the construction of a new school building built after October 12, 1988, or an accredited inspector signs a statement that no ACBM was specified as a building material in any construction document for

the building, or, to the best of his or her knowledge, no ACBM was used as a building material in the building. The local education agency shall submit a copy of the signed statement of the architect, project engineer, or accredited inspector to the EPA Regional Office and shall include the statement in the management plan for that school.

(b) The exclusion, under paragraph (a)(1) through (4) of this section, from conducting the inspection under 763.85(a) shall apply only to homogeneous or sampling areas of a school building that were inspected and sampled before October 17, 1987. The local education agency shall conduct an inspection under § 763.85(a) of all areas inspected before October 17, 1987, that were not sampled or were not assumed to be ACM.

(c) If ACBM is subsequently found in a homogeneous or sampling area of a local education agency that had been identified as receiving an exclusion by an accredited inspector under paragraphs (a)(3), (4), (5) of this section, or an architect, project engineer or accredited inspector under paragraph (a)(7) of this section, the local education agency shall have 180 days following the date of identification of ACBM to comply with this Subpart E.

Supreme Court, U.S.
FILED
OCT 17 1988
JOSEPH F. SPANIOL, JR.

No. 88-241

In the Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL GYPSUM COMPANY, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that the United States Environmental Protection Agency's school-asbestos rules were lawful under the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. (Supp. IV) 2641-2654.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 846 F.2d 79.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1988. The petition for a writ of certiorari was filed on August 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 17, 1987, the United States Environmental Protection Agency (EPA) issued rules pursuant to the Asbestos Hazard Emergency Response Act of 1986

(AHERA)[1] requiring schools—described as local education agencies (LEAs) under AHERA—to establish and to execute plans to manage asbestos-containing materials found in school buildings. 52 Fed. Reg. 41826 (1987) (AHERA rules).[2] Several former manufacturers of asbestos-containing products, including petitioner, challenged the rules as failing to fulfill AHERA's mandate. The court of appeals upheld the AHERA rules (Pet. App. A1-A13).

1. Since 1979, the EPA has operated a technical assistance program to assist LEAs and other building owners to identify and to control asbestos in their buildings. In connection with that program, the EPA issued several documents designed to provide guidance for managing asbestos in buildings. The last of such guides, issued in 1985, was entitled "Guidance for Controlling Asbestos-Containing Materials in Buildings" and is known as the "Purple Book." The book provides a brief intro-

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[1] Pub. L. No. 99-519, 100 Stat. 2970. Section 2 of AHERA, 100 Stat. 2970-2988, added Title II to the Toxic Substances Control Act (TSCA), 15 U.S.C. (Supp. IV) 2641-2654, which is reproduced in the appendix to the petition for a writ of certiorari (at A14-A51). Hereafter, we cite AHERA to the United States Code section but omit express reference to "Supp. IV."

[2] Exposure to asbestos presents well-documented and potentially serious risks to public health, including asbestosis, pleural and peritoneal mesothelioma, and cancers of the lung and other organs. The asbestos in place in school buildings could release dangerous fibers if not dealt with properly, and even ordinary maintenance and cleaning can cause dangerous concentrations of fiber. See 47 Fed. Reg. 23363 (1982); see also 45 Fed. Reg. 61969 (1980). Although the EPA banned use of asbestos in 1973 (40 C.F.R. 61.148; 38 Fed. Reg. 8826 (1973)), a large amount of asbestos used before 1973 remains in buildings, including schools, throughout the country.

Citations to the AHERA rules are hereafter to the provisions of 40 C.F.R. at which they are to be codified. See Pet. App. A53-A103.

duction to the problem of asbestos but is merely advisory and contains only general guidance.

In response to a number of concerns about the EPA's asbestos program, Congress enacted AHERA in 1986. It expressly found that the EPA's then-current rules for dealing with asbestos in schools did not contain "standards for * * * appropriate response actions" or a "requirement that response actions * * * be carried out in a safe and complete manner." 15 U.S.C. 2641(a)(1). Congress also found that there was neither a uniform program for accrediting persons who identify or remove asbestos nor a regulatory requirement that only accredited persons perform those tasks. 15 U.S.C. 2641(a)(2). In addition, Congress determined that the EPA's Purple Book was insufficient to ensure adequate responses. 15 U.S.C. 2641(a)(3).

Accordingly, Congress in AHERA directed the EPA to promulgate comprehensive rules within 360 days of the statute's enactment. 15 U.S.C. 2643(a). The rules must (1) require schools to inspect for asbestos; (2) describe response actions for at least four circumstances—when there is actual or reasonably likely damage or significant damage to friable asbestos[3]; (3) require schools to implement those response actions; and (4) require schools to develop management plans detailing the inspection of, and actions to be taken with respect to, asbestos. 15 U.S.C. 2643(b)-(e) and (i). The EPA's regulations "must protect human health and the environment" (15 U.S.C. 2643(a)),

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[3] The statute requires the EPA to define the appropriate response action in at least four circumstances—when there is either (a) damage or (b) significant damage to friable asbestos-containing material, and when such asbestos is in areas regularly and normally used by building occupants and either (c) damage or (d) significant damage is reasonably likely. 15 U.S.C. 2643(c). Asbestos-containing material is "friable" if, when dry, it may be "crumbled, pulverized, or reduced to powder by hand pressure" (15 U.S.C. 2642(6)).

and they must offer such protection against both "*actual* [and] *potential* exposures to releases of asbestos that may cause adverse effects on human health or the environment" (132 Cong. Rec. H8823 (daily ed. Oct. 1, 1986) (remarks of Rep. Florio) (emphasis added); 132 Cong. Rec. S15065 (daily ed. Oct. 3, 1986) (emphasis added) (joint explanatory statement)).

More specifically, AHERA requires that the EPA, in describing appropriate response actions, identify the least burdensome methods that protect human health and the environment, taking into account local circumstances, including occupancy, building use, and costs. 15 U.S.C. 2643(d)(1)-(5). The statute also directs the EPA to consider and assess various technologies in order to improve LEAs' response-action decisionmaking processes. 15 U.S.C. 2643(c)(2). And, to ensure that there is oversight and participation by parents, teachers, and school employees, the EPA's regulations must require each LEA to develop an asbestos management plan (15 U.S.C. 2643(i)) that includes, among other things, the results of the inspection of the school buildings and a detailed description of the measures to be taken in response. 15 U.S.C. 2643(i)(1)(A)-(I). That plan must be made available for inspection by the public (15 U.S.C. 2643(i)(5)) and must be submitted to the Governor (15 U.S.C. 2643(i)(6)), who is empowered to disapprove it if, among other things, it does not conform to the EPA's AHERA rules (15 U.S.C. 2645(a) and (c)).

2. The AHERA rules promulgated by the EPA prescribe detailed procedures for the inspection of schools. They require that inspectors be accredited (40 C.F.R. 763.85)[4] and that each inspector classify any

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[4] AHERA provides that no one may inspect a school, develop a management plan, or design or conduct response actions without

damaged or potentially damaged asbestos according to prescribed categories (40 C.F.R. 763.88(a)(1)) and provide the LEA with a written assessment (40 C.F.R.763.88(b)). Under the rules, an accredited management plan developer must then recommend in writing appropriate response actions in accordance with the AHERA rules. That recommendation must be placed in the LEA's mandatory management plan (40 C.F.R. 763.93) and submitted to the Governor and made available to the public—in particular, to parents, teachers, and other school employees (40 C.F.R. 763.93(a) and (g)(1)(4)).

In accord with prevailing scientific opinion, the EPA decided not to prescribe air monitoring as the primary tool for determining the appropriate response action for asbestos. The agency explained that numerical values in air tests would "provide a false sense of precision regarding the presence and severity of asbestos hazards"—specifically, the threat posed by episodic releases of asbestos fiber. 52 Fed. Reg. 41838 (1987). It concluded, instead, that visual inspection of the condition of asbestos-containing materials in particular locations, when conducted by a trained expert, would be a better method for evaluating potential as well as actual fiber releases. *Id.* at 15831, 41838.

In addition to rejecting air monitoring as the primary assessment tool, the EPA refined the definitions of the categories of asbestos problems identified by Congress (actual or potential damage or significant damage). 40 C.F.R. 763.83; see 52 Fed. Reg. 15823 (1987). For example,

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being properly accredited. 15 U.S.C. 2646(a)(1)-(3). Accreditation must be accomplished either by the EPA or by a state that has a plan at least as stringent as the EPA Model Accreditation Plan (15 U.S.C. 2646(a)), which requires initial accreditation and annual refresher courses. The Model Plan is codified at Appendix C to Subpart E of 40 C.F.R. Pt. 763.

the agency's definitions for damaged asbestos focus on physical characteristics such as loss of structural integrity, sagging, water damage, gouges, and the like. The EPA also defined the various response actions identified by Congress in AHERA. The definitions require that enclosure, encapsulation, and repair of asbestos, if undertaken by LEAs, must *prevent* the release of asbestos fibers. 40 C.F.R. 763.83; see 52 Fed. Reg. 41830, 41832, 41836 (1987).

Recognizing that its descriptions of appropriate response actions must be flexible enough to accommodate the variations in the condition and location of asbestos in schools across the nation, the EPA decided to allow LEAs discretion to define their responses within a range of appropriate alternatives. The appropriate response thus would depend on such factors as the location and condition of the asbestos-containing material, the technological feasibility of various response actions, and economic considerations. See 52 Fed. Reg. 15829 (1987); *id.* at 41832. The EPA also described an approach by which the LEA can select the least burdensome option from the range of response actions that are sufficient to protect human health and the environment. 40 C.F.R. 763.90; 52 Fed. Reg. 15829, 41832 (1987). Under that approach, if asbestos is in some degree damaged, some action is generally required. The overriding concept, however, is to return the damaged material to an undamaged state or to prevent damage from occurring, so as to prevent fiber release.

3. Various asbestos manufacturers challenged the AHERA rules on several grounds. They argued, among other things, (1) that the EPA had failed to identify appropriate response actions that were sufficient to protect health and the environment and were the least burdensome and that the EPA had erred in leaving those determina-

tions to the LEAs with the help of accredited contractors; (2) that the EPA had erred in failing to determine what level of exposure to asbestos was "safe"; (3) that the EPA had failed to provide an objective means for distinguishing safe from unsafe schools and should have adopted air monitoring as the objective means for doing so; and (4) that the EPA had improperly permitted LEAs to remove asbestos in schools even though removals increase rather than decrease airborne asbestos levels. The court of appeals rejected all of those arguments (Pet. App. A1-A13).

First, the court held (Pet. App. A7-A9) that the EPA had acted properly under the statute in not specifying a single least burdensome response action in the statutorily specified situations but instead "offer[ing] a list of specific responses that it adjudged sufficient to protect human health, along with a *method* by which school officials should be able to determine the least burdensome response" (*id.* at A8) (emphasis in original). The court noted that Congress had imposed on the EPA the burden of reconciling several competing demands—notably, that the EPA generally describe response actions using the least burdensome methods, and that, in doing so for the more than 30,000 schools covered by the statute, it take account of local conditions (*id.* at A7-A8). Because the EPA could not visit every school, the EPA could reasonably settle on a solution that worked a compromise—providing for inspections of local conditions by accredited inspectors, preparation of detailed reports setting forth options and recommendations, selection of a response action from among those found sufficient by the EPA, and oversight by state Governors. That compromise solution, the court concluded (*id.* at A8), effected a "reasonable, faithful in-

terpretation of AHERA's somewhat contradictory commands."[5]

The court of appeals also found meritless the contention that the EPA erred in acting before determining what quantitative measure of asbestos exposure was safe and in not mandating use of air monitoring to determine when that level is exceeded (Pet. App. A9-A10). The court observed (*ibid.*) that Congress had recognized that experts currently disagree over what levels of exposure are safe, that the EPA had not abandoned its duty but had considered evidence on the question, and that Congress had "stated that EPA's existing guidelines should serve as minimum standards in devising appropriate response actions" (*id.* at A9). The legislative history, the court noted (*ibid.* (citing 132 Cong. Rec. S15064-S15066 (daily ed. Oct. 3, 1986) (joint explanatory statement); *id.* at H8823 (daily ed. Oct. 1, 1986) (remarks of Rep. Florio)), "affirmatively suggests" that the EPA need not rely on air monitoring or establish a quantitative measure of minimum safety. Rather, Congress contemplated growing precision in the EPA's regulations as more information becomes available (Pet. App. A9-A10). The court added (*id.* at A10 (emphasis in original)): "Indeed, the petitioners' insistence that EPA construct a quantitative model before it do anything else offends common sense as well as congressional intent, for the *potential* hazards posed by presently undamaged [asbestos-containing material] obviously could not be quantified or measured by air monitoring techniques." Especially in light of the congressional directive that the EPA err on the side of caution, the

[5] The court also observed (Pet. App. A7): "it is highly ironic that industry representatives assail EPA for supplying inadequate guidance to school officials when their counsel have assured us that those officials are now thoroughly satisfied with the regulatory guidance provided by EPA."

court concluded (*ibid.*), the EPA's decision not to require air monitoring or to designate certain exposure levels as safe was not arbitrary or capricious.

The court of appeals further ruled (Pet. App. A11-A13) that the EPA reasonably rejected the manufacturers' contentions that removal of asbestos should be prohibited or limited. The court observed (*id.* at A11 (emphasis in original)) that the EPA reasonably rejected the manufacturer's evidence that removal caused increased levels of asbestos in the air, because that evidence was "based on a small sample of cases, in at least some of which abatement actions were *not* done properly," and the "EPA's regulations covering removal were intended to prevent this occurrence in the future." The court added (*id.* at A11-A12) that "Congress apparently assumed that removal would always be an option." Finally, the court rejected as "patently mistaken" the argument that removal should be prohibited simply because it is "merely innocuous rather than beneficial" (*id.* at A12). The court noted that the EPA's regulations were entirely neutral with respect to removal and were fully in accord with congressional intent, because the legislative history made clear that the EPA " 'should not discourage a school from going ahead and eliminating [its] long-term asbestos problem if school officials should decide that is the best course of action.' " *Ibid.* (quoting 132 Cong. Rec. S15067 (daily ed. Oct. 3, 1986) (remarks of Sen. Baucus) and citing *id.* at S15066 (remarks of Sen. Stafford)).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

Petitioner's primary contention (Pet. 17-21) is that the court of appeals failed to hold the EPA to the mandate of AHERA and instead permitted the agency to escape its duty because it had made a "good faith" effort. That contention is wholly without merit. Nowhere in the court of appeals' opinion do the words "good faith" appear, and nowhere in the opinion is there any suggestion that a mere good faith effort to comply with a statutory mandate can validate a regulatory action that is in fact contrary to statutory commands. What the court of appeals concluded was that AHERA contains "somewhat contradictory commands" and that the EPA's AHERA rules are a "reasonable, faithful interpretation" of those commands in light of current scientific knowledge (Pet. App. A8). Accordingly, the court of appeals did not, as petitioner suggests, depart from ordinary principles of judicial review of agency rulemaking.

Petitioner is also incorrect in its more focused challenges (Pet. 17-18, 20-21, 24-28) to the court of appeals' ruling. In fact, the court correctly found the EPA's rules valid.[6] As the court of appeals explained (Pet. App. A8-A9), Congress directed the EPA, within 360 days, to describe appropriate response actions for various situations presenting actual or potential asbestos problems and to do so in a way that ensures that account would be taken of the local conditions at more than 30,000 schools throughout the nation. The statute further recognizes that it is the schools, not the EPA, that are to develop the necessary asbestos management plans. In those circumstances, it was entirely appropriate, as the court of ap-

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[6] Petitioner does not dispute that the regulations must be upheld unless they are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)). See 15 U.S.C. 2618(c)(1)(B).

peals ruled (*id.* at A9), for the EPA to establish a range of appropriate response actions together with a sound method by which local officials, with oversight and accredited expert guidance, would select the proper actions for particular problems.[7]

Similarly, given the persistent scientific disagreements about what level of exposure to asbestos (if any) is safe and the clear congressional directive to address potential as well as actual exposure, the EPA acted reasonably, as the court of appeals concluded (Pet. App. A8-A10), in choosing to rely on expert visual inspection rather than air monitoring and in declining to declare that certain levels of exposure are safe. In particular, the EPA's action fully complied with the statutory mandate to "consider and assess" (15 U.S.C. 2643(c)(2)) air monitoring; and the EPA reasonably concluded, based on the risk of exposure during peak episodes of fiber release, that visual inspection is preferable to air monitoring, which could give school officials a false sense of security. Certainly, petitioner's suggestion that the EPA should have done nothing until it could resolve the scientific uncertainty and construct a quantitative model "offends common sense as well as congressional intent" (Pet. App. A10).[8]

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[7] Contrary to petitioner's suggestion (Pet. 18), the congressional declaration that the Purple Book provided inadequate guidance is no ground for finding the EPA rules invalid. The EPA rules furnish more guidance than the Purple Book, including a step-by-step procedure for LEAs to select the least burdensome response action. And the level of detail in the guidance furnished by the EPA rules is, as noted, reasonable in light of the commands of AHERA.

[8] Contrary to petitioner's contention (Pet. 20), the court of appeals' decision does not conflict with this Court's decision in *Industrial Union Dep't* v. *American Petroleum Institute*, 448 U.S. 607 (1980). That case did not involve AHERA but 29 U.S.C. 652(8). The Court's construction in that case, without a majority opinion, of a different

Petitioner contends (Pet. 21-24) that this Court should grant the petition because the ruling below is in an "area of great national importance with far-reaching fiscal and environmental consequences" (*id.* at 21). But the alleged consequences of petitioner's challenge are not sufficient to render further review of the court of appeals' decision appropriate, there being no intercircuit conflict and no substantial legal question presented. Moreover, although the problem of asbestos in school buildings is important, petitioner overstates the impact of its particular challenges.

Petitioner does not challenge the requirements that schools conduct inspections and develop operations and management plans for asbestos that they find. It is those requirements that produce most of the costs associated with the AHERA rules. Similarly, it is at best speculative to suggest that petitioner's challenge would have a significant effect on the costs associated with the many lawsuits that various building owners have brought against asbestos manufacturers seeking reimbursement for abatement. And, of course, the rules do not apply at all to non-school buildings. Hence, even if petitioner were correct in its challenges and the alleged deficiencies in the AHERA rules were eliminated, allowing the court of appeals' decision to stand would not have the far-reaching consequences that petitioner states.

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statute with different language and different legislative history is of little relevance to the proper construction of AHERA in this case.

There is also no merit in petitioner's suggestion (Pet. 20) that the EPA's authorization for schools to delegate their duties to expert contractors (40 C.F.R. 763.80(a)) creates a constitutional delegation problem. The regulation cited by petitioner itself makes clear that schools retain ultimate responsibility for asbestos response actions. In any event, insofar as delegation principles are relevant, AHERA itself clearly provides sufficient standards to guide agency action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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